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In the Supreme Court of the United States

October Term, 1980

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the giving of an instruction to the jury in a criminal action that it could "reject" the defendant's testimony solely on the basis that it felt his interest in the outcome of the prosecution was "sufficient to affect" his credibility constitutes reversible error.

2. Whether the exclusion of Petitioner's evidence under Rule 403 of the Federal Rules of Evidence, prior to the presentation of Petitioner's defense, constitutes reversible error.

a. Whether the Fifth Circuit can uphold the trial court's exclusion of evidence under Rule 403, using the "abuse of discretion" standard of review, on grounds neither considered by the trial court nor contained in Rule 403.

b. Whether the trial court's failure to listen to the proffered testimony is an improper exercise of discretion as required by Rule 403.

c. Whether it was an abuse of discretion, in light of the circumstances presented at this trial (including the trial court's singling out of the Petitioner), to exclude certain relevant evidence which was crucial to the Petitioner's defense and which would have served to bolster his credibility.

3. Whether a noncollected check upon which a bank extends credit can be "security" within the meaning of Title 18, United States Code §1014.

4. Whether a noncollected check upon which a bank extends credit and which is an enforceable obligation can be alleged in an indictment to be a "false statement" under 18 U.S.C. §1014 on the theory that it is "overvalued".

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RECORD CITATION

The Record will be cited as it was numbered for the appeal to the Fifth Circuit Court of Appeals as follows:

Trial transcript (Vol. I) is cited as, R, III, pp. 77-407.

Proffer of testimony transcript (Vol. II, Supplemental Record) is cited as, S.R.I, pp. 1-31.

Defense exhibits (excluded from evidence), are cited as, D. Ex. 1-22 (excluded from evidence).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, William Archie Williams, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 19, 1981.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States v. Williams*, No. 80-3064, 639 F.2d 1311 (5th Cir. 1981), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1981. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on April 17, 1981, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1.(f), the verbatim quotation of the following Rule and Statutes is set forth in Appendix E hereto.

Rule 403, Federal Rules of Evidence.

Title 18, United States Code, §656.

Title 18, United States Code, §1014.

STATEMENT OF THE CASE

On October 19, 1979, a three-count superseding indictment was returned against William Archie Williams (hereinafter "Williams"), the petitioner in this matter. Count I of the indictment alleged that Williams had, with intent to injure and defraud, misapplied funds of the Pelican State Bank (hereinafter referred to as "PSB"), in the amount of $58,055.44, in violation of 18 U.S.C. §656. Counts II and III of the indictment alleged similarly that Williams had willfully overvalued "a security" in violation of 18 U.S.C. §1014 by depositing a personal check in his account at PSB (Count II), and a personal check in his account at the

Winn State Bank (Count III), then knowing that there were insufficient funds in the accounts at the respective drawee banks to cover the checks.

On December 12, 1979, Williams was convicted on all three counts of the indictment. Williams appealed his conviction to the United States Court of Appeals for the Fifth Circuit (Docket No. 80-3064), and on March 19, 1981, Judge Kunzig, Judge of the United States Court of Claims, sitting by designation, wrote the opinion which is the subject of this appeal affirming the conviction of Williams on all three counts. 639 F.2d 1311. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Williams contended on appeal that the trial court's charge on credibility, which not only singled him out, but which also allowed the jury to totally reject his testimony if they believed that his interest in the case merely "affected" his credibility, was error. The Fifth Circuit failed to address this significant issue in its opinion concluding that all points not addressed by the opinion "have been considered and found to be without merit." *United States v. Williams*, 639 F.2d 1311, 1320 (5th Cir. 1981).

Williams further contended that Counts II and III should be dismissed on the grounds (1) that a noncollected check is not "security" within the meaning of 18 U.S.C. §1014; and (2) that such a check cannot be "false" under 18 U.S.C. §1014 on the theory that it is "overvalued". Relying on *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the Fifth Circuit rejected these claims. 639 F.2d at 1319-1320.

Williams also contended on appeal that the trial court erred in excluding certain proffered documents and testimony on the grounds that they were crucial to his defense, were relevant to show that he lacked any intent to injure

and defraud the bank, and were relevant to show that he reasonably believed that the checks alleged to have been false statements were covered by sufficient funds. The Fifth Circuit upheld the trial court's exclusion of this evidence under Federal Rule of Evidence 403. The Fifth Circuit in discussing the exclusion of evidence concluded that:

> "It is easily seen that the proffered evidence fail[ed] to shed any light upon the principal factual controversies left open by the evidence which was admitted: whether and to what extent, William Archie Williams lent his personal funds to the Pelican Bank so that it could meet its financing commitment to General Motors." *Id.* at 1317.

The Fifth Circuit also concluded that the proffered evidence "is needlessly cumulative; that is, it merely leads to factual conclusions already amply supported in the record (and which the jury apparently discounted)," *Id.* at 1317. The Fifth Circuit further concluded that "procedural costs more than substantially outweigh probative value." *Id.*

The $58,055.44, alleged to have been misapplied by Williams in Count I, was the total amount of a large number of checks written by him between December 20, 1977 and May 2, 1978, on his account at PSB while his account was in an overdraft status. Crucial to his defense on Count I, Williams sought to show that he lacked any intent to injure and defraud the bank because, at all times that his account was overdrawn, he had a much greater amount of personal funds extended through and on behalf of PSB to Taylor Motor Company (hereinafter "TMC") thereby, in effect, making Williams a creditor of the bank [*See, e.g.*, R, III, pp. 249-250, 252-253, 255-256, 268, 270-271; Supplemental Record ("SR"), I (excluded from evidence)].

The personal funds advanced by Williams ($79,678.00 from December, 1977 to March, 1978) were to cover legal and contractual obligations of PSB, and had been extended through PSB to finance the purchase of certain vehicles by TMC. [R, III, pp. 268-271; SR, I, pp. 15-22, and D. Ex. 10-14, 18-22 (excluded from evidence)]. Evidence which was probative of Williams' infusion of his personal money into PSB was directly relevant to the defense that he had no intent to injure and defraud the bank.

In his defense of Counts II and III, Williams sought to show that he had been entitled to some $60,000 in proceeds from the sale of TMC as a result of his having extended funds into PSB which were used to finance vehicles purchased by said entity. Williams sought to show that had the $60,000 received from said sale been credited to his account by Ollie Stone, PSB's cashier, in accordance with Williams' instructions [R, III, pp. 136, 274-275], the checks, alleged in Counts II and III to have been "overvalued," would have been covered by funds when presented for payment at the drawee banks. [SR, I, pp. 2-29; D. Ex. 10-14, 16-22 (all excluded from evidence)]. [*See also*, R, III, pp. 183, 272, 277, 280, 259].

Thus, the fact that Williams had extended his personal funds to cover legal obligations of PSB would have shown that he had a reasonable expectation to believe that the checks, alleged to have been "overvalued" in Counts II and III, would have been covered when presented for payment because of his entitlement to the $60,000.

The District Court excluded Williams' documentary evidence and certain testimony which would have shown that Williams had extended funds to finance certain vehicles shipped to TMC (a legal obligation of PSB), and that Williams was entitled to retain the $60,000 received by him from the sale of the motor company. [SR, I, pp.

2-31; D. Ex. 8-14; 18-22 (all excluded from evidence)]. The excluded evidence would have provided significant support to Williams' defense that there existed a greater monetary obligation from PSB to Williams than Williams owed the bank as a result of the overdrafts. [*See* R, III, p. 268; and SR, I, pp. 1-31].

The District Court excluded the proffered documents and proposed accompanying testimony *in limine prior* to Williams even beginning his defense case [R, III, pp. 225-248], without hearing the proffered testimony which was to accompany the tender of certain documentary evidence, and *after* the Government was permitted in its case in chief to offer evidence from at least three witnesses (present and past officers of PSB) to the effect that Williams had no deposits or savings at the bank other than his checking account. [R, III, pp. 93, 107, 117]. As a result of the exclusion of this evidence, the petitioner's own testimony took on even greater significance to the defense than it otherwise would have if the proffered testimony and documents had been admitted into evidence.

After the exclusion of evidence and the close of the defense case, the District Court then permitted the Government in rebuttal to call two officers of PSB, including Ollie Stone, cashier at PSB during the period December, 1977 through May, 1978; a federal bank examiner who had participated in the audit of PSB in May, 1978; and Jessie Bridges of TMC, all of whom testified essentially that Williams had not extended personal funds on behalf of the bank, and that there had been no monetary obligation on the part of the bank in favor of Williams. [R, III, pp. 352-353, 364-365, 368, 378-380].

In its charge the trial court singled out the defendant by telling the jury that Williams had a "keen personal

interest" in the outcome of the trial, and then went on to instruct the jury as follows:

> *"If you feel that this interest is sufficient to affect the defendant's credibility then—of course—you are free to reject his testimony.* But, remember you may not reject his testimony merely because William Archie Williams is the defendant in this matter." [R, III, pp. 392-93 (emphasis added)].

Significantly, the Fifth Circuit concluded that the jury "apparently discounted . . . factual conclusions . . . which were already amply supported in the record". 639 F.2d at 1317.

REASONS FOR GRANTING CERTIORARI

I. The District Court's Giving of an Instruction to the Jury That It Could "Reject" the Defendant's Testimony Solely on the Basis That It Felt His Interest in the Outcome of the Action Was "Sufficient to Affect" His "Credibility" Is in Conflict With This Court's Decision in *Reagan v. United States*, 157 U.S. 301 (1895); Presents a Conflict Among the Circuit Courts of Appeals; and Raises a Significant Issue Which Goes to the Heart of a Criminal Defendant's Right to Testify on His Own Behalf.

A. The District Court's Instruction Is in Conflict With This Court's Decision in *Reagan v. United States*, 157 U.S. 301 (1895).

This Court, in *Reagan v. United States*, 157 U.S. 301 (1895), was faced, in a criminal action, with the question whether it was proper for the trial court to suggest in its instructions to the jury that the defendant has a significant personal interest in the outcome or result of the action.

In upholding the charge given by the trial court in *Reagan v. United States,* this Court clearly recognized that the interest of a defendant in the outcome of the action is only a factor for the jury to consider in determining the weight, credence and effect to be given to the defendant's testimony. The charge upheld by the Supreme Court in *Reagan* instructed the jury that it "must *determine how far* [*the defendant's evidence*] *is credible,*" and that the interest of the defendant in the result of the action "should be considered by the jury in *weighing his evidence and in determining how far or to what extent,* if at all, it is worthy of credit." *Id.* at 304 (emphasis added).

The cases cited by this Court in *Reagan* similarly involved instructions which pointed out the interest of the defendant as a factor to be considered by the jury when determining the weight and "amount of credibility" to be given to the defendant's testimony. *Id.* at 306-310. *See also, Hicks v. United States,* 150 U.S. 442 (1893).

This Court, however, has *never* extended a trial judge's right to give a charge such as was given in the case at issue. In its charge to the jury, the trial court in this matter first singled out Williams by telling the jury that Williams had a "keen interest in the outcome of the trial." [R, III, pp. 292-293]. The trial court then went significantly further by charging that the jury was "free to reject [Williams'] testimony" if they felt, *without any limitation or reference to degree,* that his interest in the outcome of the case "is sufficient to affect the defendant's credibility."

This charge, *per se,* is patently unfair and prejudicial to Williams, is unsupported by authority, and constitutes plain error which affects the petitioner's substantial rights.

The trial court's charge does not, by its literal terms, even require that the "interest" in fact affect the defendant's credibility, only that it be "sufficient to affect" his credibility. It is virtually inconceivable that a defendant who has a "keen personal interest in the outcome" of a criminal proceeding will be able to select a jury which does not "feel" that such "keen" interest is "sufficient" to "affect" that defendant's credibility in at least some minimal way. As recognized by this Court in *Reagan v. United States*:

> "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent effects the question of credibility . . . . but the interest is to be considered as affecting his credibility." *Reagan v. United States*, 157 U.S. 301, 305-06 (1895).

The trial court's decision conflicts with *Reagan* (1) because it is tantamount to an instruction to the jury to disregard the defendant's testimony; and (2) because a suggestion to the jury of the interest of a defendant, if proper, must be done only as "a circumstance to be considered in weighing his testimony and determining the credence that shall be given to his story." *Reagan v. United States, supra* at 306.

We respectfully submit that the conflict between the charge given by the trial court and this Court's opinion in *Reagan* deserves careful review by this Court.

B. The Decision Below Conflicts With the Decisions of Other Circuit Courts of Appeals Which Have Disapproved of Singling Out a Defendant in a Criminal Case When Instructing the Jury As to Credibility.

The Fifth Circuit has allowed an instruction to the jury to the effect that it may consider the defendant's interest in the outcome of the case "in determining the degree of credibility that could be afforded to the defendant's testimony." *See, e.g., Nelson v. United States,* 415 F.2d 483, 487 (5th Cir. 1969), *cert. denied,* 396 U.S. 1060 (1970); *United States v. Wiggins,* 566 F.2d 944 (5th Cir. 1978), *cert. denied,* 436 U.S. 950 (1978).

A number of other circuit courts of appeals have also approved instructions which single out a defendant in weighing the credibility to be given to the defendant's testimony, and are in agreement with the essential holdings in the above-cited Fifth Circuit cases. *See, e.g., United States v. Hernandez,* 588 F.2d 346, 349-350 (2nd Cir. 1978); *United States v. Hill,* 470 F.2d 361 (D.C. Cir. 1972); *United States v. Jones,* 459 F.2d 1225 (D.C. Cir. 1972).

Decisions of other circuits, on the other hand, have directly criticized instructions to the jury on credibility in a criminal case which single out the defendant as being improper. In *Taylor v. United States,* 390 F.2d 278 (8th Cir. 1968), *cert. denied,* 393 U.S. 868 (1968), the appellant asserted error because the Court instructed the jury: "It is for you to remember, you have a perfect right to do so, the very grave interest a defendant has in the case." 390 F.2d at 284. The Court expressed its strong disagreement with this type of charge. Mr. Justice Blackmun, then a Judge on the United States Court of Appeals for the 8th Circuit, stated in *Taylor:*

"We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as 'including the defendant', should suffice." 390 F.2d at 285.[1]

This preference was forcefully articulated in the later Eighth Circuit case of *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976), *cert. denied*, 429 U.S. 846 (1976), wherein the Court stated with respect to an instruction singling out the defendant that: "It is difficult to understand, in light of the decision of this Circuit, why it was given. . . . [T]he continued use of this instruction can cause this Court to declare, as a *per se* rule, that the error in giving the instruction can never be considered harmless." *See also, United States v. Brown*, 453 F.2d 101, 107 (8th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *United States v. Long*, 449 F.2d 288, 298-299 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

The Seventh Circuit has also expressed its disagreement with a charge singling out a defendant, and has indicated its agreement with the *Taylor* decision. *United States v. Saletko*, 452 F.2d 193, 197-8 (7th Cir. 1971), *cert, denied*, 405 U.S. 1040 (1972). The Seventh Circuit in *United*

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1. The trial judge in the instant case did not specifically extend the general credibility charge to the petitioner, but rather couched it in terms of each witness. Moreover, the charge singling out Williams did not follow immediately after the general credibility charge, thereby giving more emphasis to the trial Court's singling out of Williams. [R, III, pp. 392-393]. *See also, United States v. Hernandez, supra*, at 349-350.

States v. Reid, 410 F.2d 1223, 1228 (7th Cir. 1969), reversed the conviction in part because of an instruction singling out a defendant which "presented an unbalanced picture to the jury which was, on the special facts of th[e] case, prejudicial error."

The First Circuit has also endorsed the admonition given by Mr. Justice Blackmun in the *Taylor* case. *Carrigan v. United States*, 405 F.2d 1197, 1198 (1st Cir. 1969), *cert. denied*, 396 U.S. 1028 (1970).

While we contend that the charge as given goes beyond any charge which singles out a defendant and which has been upheld by this Court or any circuit court of appeals, the resolution of the clear conflict between the circuits as discussed above, if decided consistent with *United States v. Taylor*, would necessarily impact directly upon the validity of the charge given in the instant case. It is clear that a number of circuits are greatly troubled with the singling out of a criminal defendant, and therefore, these conflicts justify the grant of certiorari to review the judgment below, and to consider the viability of this Court's decision in *Reagan*.

C. The Jury Instruction Singling Out the Defendant Raises a Significant Issue With Respect to a Trial Court's Right to Comment Upon the Defendant's Credibility After He Has Testified in a Criminal Proceeding Since the Charge As Given by the District Court Goes Well Beyond Any Decision by This Court or by Any Circuit Court of Appeals.

The question whether singling out a criminal defendant in an instruction on credibility is proper has been raised many times in the Circuit Courts of Appeals. See cases cited *supra*. However, the instruction in the case at issue greatly extends the limitations previously set by this Court

and by these circuits to a point where approval of such a charge will significantly undermine the right of a defendant to testify on his own behalf.

The instructions singling out a defendant, which have been upheld by the various Circuit Courts of Appeal, have invariably pointed out the defendant's interest only as a factor for the jury to consider in making a decision as to what *degree* of credibility to attribute the defendant's testimony. *See also,* the cases cited by this Court in *Reagan v. United States, supra,* and cases cited therein. 157 U.S. 301, 305-06 (1895). This Court also has recognized the importance of this function by a jury. As stated in *Quercia v. United States,* 289 U.S. 466, 471 (1933):

> "It [is] for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law."

We have been unable to find any decision which goes as far as the case at issue which, in effect, allows a jury to reject a defendant's testimony simply if it concludes that the defendant's interest in the outcome, *to any extent or degree,* could affect his credibility. With the instruction as given, the jury could totally reject the petitioner's testimony if his credibility was affected minutely as to an immaterial fact.

The correctness of the trial court's instruction, even assuming the propriety of singling out a defendant, is open to serious question, and in the instant case was clearly prejudicial. As discussed *infra,* the fact that the District Court excluded significant defense evidence increased the petitioner's reliance upon his own testimony which served

as the major basis upon which he claimed his innocence. Singling him out effectively undermined the defense case. This issue is of sufficient importance so as to warrant review by this Court.

II. The Trial Court's Exclusion of Certain Proffered Evidence and the Fifth Circuit's Opinion Raise Significant Issues Regarding the Application of Rule 403 of the Federal Rules of Evidence in a Criminal Trial, and Conflict With Circuit Courts of Appeals in Other Jurisdictions.

The exclusion of evidence by the trial court under the auspices of Rule 403 of Federal Rules of Evidence, and the discussion of Rule 403 by the Fifth Circuit, present serious questions regarding the application of Rule 403 when relied upon to exclude evidence going to the heart of a valid defense in a criminal trial. The exclusion of evidence under Rule 403 in the instant case, which we submit was erroneous, demonstrates the pressing need for guidance from this Court as to the proper application of Rule 403.

The petitioner's defense at trial was based entirely upon a showing that at all times when the petitioner's account was overdrawn (Count I), he had advanced his personal funds into PSB, to cover its legal obligations, in an amount much greater than the amount overdrawn. The jury could rely on this testimony to find that Williams lacked any intention to injure or defraud the bank, and that there was not a reasonable probability of loss. *See, e.g., United States v. Riley,* 550 F.2d 233 (5th Cir. 1977); *United States v. Foshee,* 569 F.2d 401 (5th Cir. 1978); *United States v. Sorenson,* 330 F.Supp. 642, 644 (D.Mont. 1971). *See also, Potter v. United States,* 155 U.S. 438 (1894). This evidence also was vitally important to the petitioner's defense on Counts II and III, because it would

have shown that he was due proceeds from the sale of TMC, and that the $60,000 money order which was received by Williams from the sale of TMC was in fact Williams' money and should have been applied to cover checks alleged as false statements in Counts II and III. This evidence bore directly on the question whether the petitioner reasonably expected to be able to cover the checks which formed the basis of Counts II and III. *See United States v. Bessessen*, 445 F.2d 463, 467 (7th Cir. 1971).

A. The Fifth Circuit's Conclusion That the Proffered Testimony and Excluded Exhibits Were "Needlessly Cumulative" Constituted an Improper Application of Rule 403 and an Abuse of Discretion.

1. The Fifth Circuit's independent application of Rule 403 on appeal directly conflicts with the discretionary power accorded the district courts, and conflicts with an opinion of the Second Circuit Court of Appeals.

The Fifth Circuit concluded that the evidence put forth by the petitioner's proffer at trial merely led to factual conclusions "already amply supported in the record, thereby being needlessly cumulative." 639 F.2d at 1317. The trial court, however, never stated nor suggested that the exhibits offered were cumulative. [R, III, pp. 325-350]. In fact, the trial court *could not* have known whether the proffered evidence was cumulative because the exhibits and proposed testimony were excluded before the defense case began, and further because the trial judge was not in the courtroom when the proffer of testimony was allowed to be made. [R, III, pp. 325-350; SR, I, p. 3]. Although it is not clear why the evidence was excluded

under Rule 403, the only discussion in the record by the trial court relates to the possibility of confusion of the jury. [R, III, pp. 325-350].

The Circuit Court, in effect, substituted its own discretion in an effort to uphold the trial court's decision without the benefit of a trial judge's "observation of witnesses, [or] his superior opportunity to get 'the feel of the case' . . . ." *Noonan v. Cunard Steamship Co., Ltd.*, 375 F.2d 69, 71 (2nd Cir. 1967). *See also, United States v. Robinson*, 560 F.2d 507, 514-515 (2nd Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905. If appellate courts are allowed merely to read the transcript, and then assert their own "discretion" under Rule 403, this undermines the very rationale upon which the appellate courts rely when stating their reluctance to disturb a trial judge's evidentiary rulings. *See, e.g., Miller v. Poretsky*, 595 F.2d 780, 783 (D.C. Cir. 1978); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). Rule 403 contemplates a "balancing" by the trial court, not an after-the-fact analysis which did not enter into the decision at the trial level.

The instant case conflicts with the circuit decision in *Dwyer* where the court refused to speculate as to the trial court's basis for a Rule 403 exclusion. 539 F.2d at 928. *See also, United States v. Figuera*, 618 F.2d 934, 942-944 (2nd Cir. 1980). The Court in *Dwyer* stated:

> "Although Rule 403 has placed great discretion in the trial judge, discretion does not mean immunity from accountability. Rosenberg, *Judicial Discretion*, 38 The Ohio Bar 819, 826 (1965). Unfortunately, where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court. . . . The spirit of Rule 403 would have been better served had the judge 'con-

> front[ed] the problem explicitly, acknowledging and weighing both the prejudice and the probative worth' of the proffered testimony." 539 F.2d at 928.

The Fifth Circuit's upholding of the trial court's discretionary application of Rule 403 on grounds not reflected by the trial record is, we submit, an improper method of reviewing the trial court's decision since a court can hardly determine whether there was an "abuse" of discretion if it is unable to discern from the record why the evidence was excluded. *See United States v. Dwyer, supra* at 928.

2. The Fifth Circuit's independent conclusion that the proffered testimony and exhibits were "needlessly cumulative" conflicts with a D.C. Circuit opinion, and fails to give weight to the requirement that arguably cumulative evidence must be *needless* before it may be excluded under Rule 403.

At trial, the petitioner was unable to rely on, discuss or present testimony regarding documentary evidence which directly corroborated his testimony. As significantly, the petitioner was unable to use the proffered testimony of Ollie Stone, a former PSB officer, who worked at the bank on a day-to-day basis. [SR, I, pp. 8-10, 12 and excluded D. Ex. 8-14, 18-22]. At the same time, the government was allowed, both in its case in chief and in rebuttal through at least seven witnesses, to attempt to show that Williams did not have money or credit at PSB to cover the amounts involved in Counts I, II, & III, and to attempt to show that he had not infused money to PSB. [*See, e.g.*, R, III, pp. 93, 107, 117, 352-384; SR, I, pp. 1-31 (excluded from evidence)]. The petitioner was prevented from utilizing non-party witnesses to bolster his

credibility by testifying with respect to the excluded documents. [SR, I, pp. 8-10, 12 and D. Ex. 8-14, 18-22 (excluded from evidence)].

The Fifth Circuit opinion in this case conflicts with the decision of *Miller v. Poretsky*, 595 F.2d 780 (D.C. Cir. 1978). In *Miller*, the court recognized the need of a party not only to meet evidence presented by the adverse party, but also to meet it by resort to a non-party witness.

In *Miller*, a case where the plaintiff alleged that he was a "victim of racial discrimination during the course of his tenancy, and subsequent eviction, from" certain apartments, the defendant was permitted to introduce evidence from black witnesses to the effect that "they had not suffered racial discrimination" at these apartments. The trial court, under Federal Rule of Evidence 403, excluded testimony proffered by the plaintiff of witnesses who allegedly had been discriminated against at these apartments. The Second Circuit, concluding that the exclusion of such evidence was an abuse of discretion, recognized the unfairness of this procedure, and also underscored the right of the plaintiff to rebut the other testimony by other than his own testimony. *Id.* at 783, 785. The Court stated:

> "Such testimony was the counterpart of that which the appellant wished to introduce through Horan, and elementary fairness would require that if the appellee could bring in such evidence, the appellant should have been allowed to do so also. The trial court in making its ruling on this matter alluded to the fact that appellees had only put on witnesses serving to rebut Mr. Miller's own statement in open court, but this rationale proves little. Clearly the testimony of third persons would be more persuasive in the jury's eyes than that of the appellant himself, and he should have been entitled—if he were able—to rebut the landlord's

defense of a non-discrimination motive by the same apparently disinterested evidence that appellees were allowed to use to rebut appellant's claim of racial animus."

* * *

"On the whole, the admission of appellees' witnesses testifying to their freedom from discrimination and the exclusion of appellant's witness testifying to the contrary was, particularly in light of the colloquy at the pretrial conference, that sort of decision which traditionally has been considered an abuse of discretion, *e.g., Burns v. United States,* 287 U.S. 216, 223, 53 S.Ct. 154, 77 L.Ed. 266 (1932); *Langnes v. Green,* 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931); *The Styria,* 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027 (1902); *Poske v. Mergl,* 169 Ohio St. 70, 157 N.E.2d 344 (1959)." 595 F.2d at 783, 785. *See also, Saunders v. Shaw,* 244 U.S. 317 (1917). *Cf., United States v. 320.0 Acres of Land, More or Less, Etc.,* 605 F.2d 762, 825-826 (5th Cir. 1979).

The Fifth Circuit opinion intimates that the fact that the defendant did not have any notes for the loan he had made to the bank may suggest that those loans were not actually made. 639 F.2d at 1316. This is precisely why the proffered testimony of the accountant and Ollie Stone, as well as the tendered documents, were of significant importance to Williams' defense.

Although the accountant may not have been able to identify the source of the funds, he was able to state unequivocally that the monies came from a third party, rather than from the bank or from TMC itself. His examination of the excluded exhibits also demonstrated that the monies which came from that third party identically

matched the money loaned to TMC. [SR, I, pp. 15-31 (excluded from evidence)]. [*See also*, D. Ex. 8(a), 10-14, 18-22 (excluded from evidence)].

The proffered testimony of Ollie Stone, the bank cashier, which related to some of the excluded exhibits, went well beyond the conclusion that some third party infused money to PSB which later was lent to TMC, and did, in fact, provide *direct* evidence of Williams' infusion of money to PSB. [The relevant quotes from Ollie Stone's proffered testimony are set out in Appendix D, hereto]. This testimony hardly replicates the petitioner's testimony.

The very weaknesses in Williams' testimony, which were pointed out by the Fifth Circuit, and the fact that the government was permitted to present evidence from seven witnesses to discredit his testimony, demonstrates that evidence supporting the petitioner's contention that he infused money to the bank could not be "needlessly cumulative". Moreover, the Fifth Circuit did not recognize a defendant's need in a criminal proceeding to have testimony from third party witnesses, a need even more pronounced because of the charge given to the jury as discussed, *supra*.

The petitioner should have an absolute right to prove, to the extent possible, that the facts which he is asserting are logically and directly supported by other testimony and evidence, even if they bear only "remotely" on the "probability" that Williams acted in good faith. *See United States v. Brandt*, 196 F.2d 653, 657 (2nd Cir. 1952). A defendant "is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous." *United States v. Bessesen*, 445 F.2d 463, 467 (7th Cir. 1971).

The unfairness of this trial demonstrates the incorrect application of Rule 403, and the violation of the petitioner's right to due process of law under the Fifth Amendment to the United States Constitution.

3. The Fifth Circuit opinion misreads and misapplies Rule 403 by invoking a balance between "procedural costs" and "probative value."

The Fifth Circuit went on to conclude, "in short", that "procedural costs more than substantially outweigh the probative value." *United States v. Williams, supra* at 1317. Rule 403 in the Federal Rules of Evidence makes no reference to "procedural costs," and consideration of "procedural costs" does not justify the trial court's exclusion of evidence.

The proffered testimony takes up only 29 pages of actual transcript, hardly a burden to impose upon the court system when so much is at stake. *See United States v. Ives,* 609 F.2d 930, 933 (9th Cir. 1979), *cert. denied,* 445 U.S. 919 (1980).

The misreading of Rule 403 by the Fifth Circuit also underscores the need for this Court to examine the scope and application of this Rule of evidence, a rule which has the potential of being subject to tremendous abuse by trial courts if left without strict standards articulated by this Court.

B. The Trial Court Improperly Applied Rule 403 to Exclude Crucial Defense Evidence.

1. The trial court's failure to listen to the proffered evidence is an improper application of Rule 403.

It is significant that the trial court excluded the proffered testimony without even hearing it. [SR, I, p. 3].

The court examined the proffered exhibits in advance of the presentation of the defense in response to the government's motion *in limine*. At that time, without allowing defense counsel to proffer the testimony which was to accompany the introduction of said exhibits, the trial court excluded the evidence. [R, III, pp. 325-350].

In a criminal trial the exclusion of evidence crucial to the defense should not be allowed under Rule 403 and under the rubric of "discretion" if the trial court does not even hear the evidence. The exercise of discretion by the trial court "means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Lagnes v. Green*, 282 U.S. 531, 541 (1931). The trial judge is not entitled to deference by the circuit courts because of being in a "superior position" to see the witnesses, their mannerisms and reactions, if he is not in the courtroom when they testify. In absence of an examination and observation of witnesses, this Court should set a standard of reviewing the trial court's "exercise of discretion" which is far more stringent than the "abuse of discretion" standard, which we submit is not justified under these facts.

2. The exclusion of this testimony was an abuse of discretion in light of its clear application to the defense asserted by the Petitioner.

It is the discretion, under Rule 403, to *exclude* evidence which goes to the heart of a valid defense in a criminal trial which we respectfully submit warrants consideration by this Court. Under Rule 403, the trial court suggested that the evidence may be confusing. [R, III, pp. 333,

339]. The excluded testimony of Ollie Stone (quoted in Appendix D) we submit not only is clear, but more importantly, goes directly to the heart of his defense, which if believed by the jury, would require an acquittal. Strict standards must be articulated by this Court in order to ensure an "informed" exercise of discretion by the trial court.

Federal Rule of Evidence 403, while serving a useful purpose in certain instances, must not be used as a device which usurps the function of the jury. The importance of the excluded evidence to the defense, coupled with the trial court's allowance of contrary evidence from a number of government witnesses, demonstrates the abuse of discretion. *See Miller v. Poretsky, supra. See also, Saunders v. Shaw, supra.*

III. The Decision Below Raises Significant Questions Regarding the Statutory Construction of Title 18, United States Code, §1014 Because (1) It Upheld the District Court's Conclusion That a Noncollected Check Upon Which a Bank Extends Credit Is "Security" Within the Meaning of 18 U.S.C. §1014; and (2) Upheld Counts II & III Which Alleged That Such a Check Is False Because It Is "Overvalued."

A Fifth Circuit panel in *United States v. Payne,* 602 F.2d 1215 (5th Cir. 1979), *cert. denied,* 445 U.S. 903 (1980). found that a check is "a security", and that giving an insufficient funds check to a bank, under certain circumstances, could constitute the "overvaluation of a security" in violation of 18 U.S.C. §1014. *Contra, United States v. Edwards,* 455 F.Supp. 1354, 1355, and 1357 (M.D. Pa. 1978). We respectfully submit that the decision in *Payne* was erroneous, and that this Court should consider the validity of *Payne* because the Fifth Circuit's ruling is contrary to both the language and history of the statute.

As written, 18 U.S.C. §1014 does not purport to prohibit the overvaluing of "a security." It prohibits, rather, the overvaluation of "security", security in the sense of collateral. The language of §1014 itself indicates that it is speaking of security in the sense of collateral because it specifically proscribes a false statement intended to influence the "substitution of security" on an extension of credit.

18 U.S.C. §1014 is derived from parts of thirteen prior code provisions. Each of its predecessors prohibited the making of a false statement to particular federal agencies, the vast majority of which were primarily concerned with making loans to farmers and homeowners. *See* U.S.C., 1940 Ed., 7 U.S.C. §§1026(a) and 1514(a); 12 U.S.C. §§596, 981, 1123, 1138(d)(a), 1248, 1312, 1313, 1441(a), and 1467 (a); and 15 U.S.C. §616(a). *See also, United States v. Edwards*, 455 F.Supp. 1354, 1355, and 1357 (M.D. Pa. 1978). These transactions involve collateral (usually real estate) given as security for extensions of credit. If a transaction ever involved "securities," it would only involve securities given as collateral. For example, 12 U.S.C. Section 1123 (1940 Ed.) and 12 U.S.C. §1313 (1940 Ed.) state, in identical language:

> "Whoever willfully overvalues any property offered as security for any such advance shall be punished by. . . ."

When a bank extends credit on an uncollected check, the check is not collateral on an obligation, it is the obligation itself. Such an advance of funds is an unsecured extension of credit. The Uniform Commercial Code specifically provides that a check does not operate as an assignment of any funds. Louisiana Revised Statutes 10:3-409(1) (hereinafter "L.R.S."). Where a bank extends funds on an uncollected check, and the check is then

dishonored, the bank merely has the right to have the check honored by the drawer. L.R.S. 10:3-413(2). The check becomes an enforceable obligation; it is not security on an obligation. *United States v. Christo,* 614 F.2d 486, 493 (5th Cir. 1980).

It should be emphasized that a bank is not obligated to give immediate credit on a check; its doing so is a credit decision. L.R.S. 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is an unsecured extension of credit, evidenced by the check. The government's evidence in the instant case so demonstrates. [*See* R, III, pp. 171-72]. Under such circumstances, the amount shown payable on a check is no different from the amount shown payable on an unsecured demand note.

Since the check upon which such funds are advanced constitutes the obligation itself, and not security on an obligation, it cannot be said that such a check is "security" within the meaning of 18 U.S.C. §1014.

Even if one were to conclude that such a check was "security" within the meaning of the statute, the "value" of such a check, like the value of an unsecured demand note, would be dependent upon the enforceability of the obligation. If the obligation is in fact enforceable, as it was in the instant case, then the obligation is not "overvalued." We respectfully submit that the Fifth Circuit's decision in *United States v. Payne,* which found that a check is "a security" under Title 18, Chapter 113, which deals with stolen property and which specifically defines "a security" to include checks and notes for purposes of that chapter, does not justify the conclusion that a check constitutes "a security" as used in Title 18, Chapter 47 on fraud and false statements (which includes 18 U.S.C.

§1014). *United States v. Payne, supra,* at 1218. *See also,* 18 U.S.C. §2311. Said chapter contains no similar definitional provision.

In absence of a definitional provision the language of a criminal statute should not be broadly construed; it should be strictly construed with "any ambiguity . . . resolved in favor of lenity." *United States v. Enmons,* 410 U.S. 396, 411 (1973); *Rewis v. United States,* 401 U.S. 808, 812 (1971).

The government contended that the checks described in Counts II and III were overvalued and, thereby, became false statements under 18 U.S.C. §1014. If there are insufficient funds at the drawee bank, at the time the check is presented, it is not "overvalued" since the check is still an enforceable obligation of the drawer. Under the Uniform Commercial Code, the drawer represents only that if the check is dishonored, he will pay the check after any necessary notice of dishonor and protest. *See United States v. Edwards, supra* at 1356-57, which conflicts with the Fifth Circuit opinion in *Payne.* In *Edwards,* the district court ruled that the face amount of a check cannot constitute a false statement.

The petitioner in this case fully complied with his contractual obligations under the UCC, and honored the check after receiving notice of dishonor. Therefore, no false statement can be inferred. Therefore, we respectfully request that the Court consider the validity of *U.S. v. Payne,* and dismiss Counts II and III of the indictment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit by mailing three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

J. Ransdell Keene, United States Attorney for the Western District of Louisiana
Ansel M. Stroud, III, Assistant U.S. Attorney
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Wade Hampton McCree, Jr., Esquire
Solicitor General
Department of Justice—Suite 5143
9th and Constitution Avenue, N.W.
Washington, D.C. 20530

This 11th day of June, 1981.

NICKOLAS P. CHILIVIS

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Archie WILLIAMS,
Defendant-Appellant.

No. 80-3064.
United States Court of Appeals, Fifth Circuit.
Unit A

March 19, 1981

Defendant was convicted in the United States District Court for the Western District of Louisiana, at Shreveport, Tom Stagg, J., of one count of misapplication of bank funds and two counts of check kiting, and he appealed. The Court of Appeals, Kunzig, J., sitting by designation, held that: (1) trial judge properly exercised his discretion to exclude series of exhibits and accompanying testimony offered by defendant in support of his argument that he was at all relevant times in a net creditor position vis-a-vis the bank; (2) monthly checking statements, cancelled checks and deposit slips of defendant which were turned over by bank president to federal agency were admissible; and (3) indictment sufficiently charged violations of federal statute.

Affirmed.

1. Criminal Law (Key) 674

In prosecution which resulted in convictions, inter alia, of misapplication of bank funds, trial judge properly exercised his discretion to exclude series of exhibits and accompanying testimony offered by defendant in support of his argument that he was at all relevant times in a net creditor position vis-a-vis the bank, since proffered evidence failed to shed any light on principal factual controversy whether, and to what extent, defendant lent his personal funds to bank so that it could meet its financing commitment. 18 U.S.C.A. § 656; Fed.Rules Evid. Rule 403, 28 U.S.C.A.

2. Searches and Seizures (Key) 7(1)

Searches and seizures conducted without prior issuance of warrant are per se unreasonable under Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. U.S.C.A.Const. Amend. 4.

3. Criminal Law (Key) 394.5(2)

Monthly checking statements, cancelled checks and deposit slips of defendant which were turned over by bank president to federal agent were admissible since defendant could entertain no legitimate expectation of privacy in contents of documentary materials which he placed in custody of bank and could entertain no legitimate expectation that bank would not deliver those documents to authorities for their perusal. U.S.C.A.Const. Amend. 4.

4. Banks and Banking (Key) 509

Defendant's actions at banks constituted classic incidents of check kiting, so that averments contained in two counts of indictment sufficiently set forth violations of

federal statute prohibiting making false statement or willfully overvaluing property or security for purpose of influencing action of bank the deposits of which are insured by Federal Deposit Insurance Corporation. 18 U.S.C.A. § 1014.

William M. Cady, Tom N. Thompson, Shreveport, La., James McPherson, New Orleans, La., Gary G. Grindler, Nickolas P. Chilivis, Randolph A. Rogers, Kenneth G. Menendez, Atlanta, Ga., for defendant-appellant.

Edward L. Shaheen, U. S. Atty., D. H. Perkins, Jr., Asst. U. S. Atty., Shreveport, La., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL, Circuit Judge.

KUNZIG, Judge:

William Archie Williams in 1979 was convicted in federal district court on one count of misapplication of bank funds and two counts of check kiting. He now appeals upon several grounds, principally evidentiary. It is our determination, however, that none of the grounds have merit.

I

In 1975, appellant William Archie Williams, an experienced businessman from rural Louisiana, purchased the majority interest in the Pelican State Bank, Pelican, Louisiana. He promptly appointed himself bank president. Pelican is a relatively small bank with only $3,000,000 in assets.

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*Judge of the United States Court of Claims, sitting by designation.

For a number of years prior to Williams' assumption of control, Pelican Bank had maintained a so-called "dummy account", an account used to charge items drawn on the bank by customers who had insufficient funds in their individual checking accounts to pay the items. A check would be paid from the bank's general pool of assets and held in the dummy account until the customer had deposited sufficient funds to cover the check. At this point, the check would be posted to the customer's account and the figure for accumulated checks in the dummy account correspondingly reduced. The dummy account statement contained a running balance of overdrafts which at all times equaled the total value of checks held in the dummy account. Also, upon each business day, the dummy account statement would be adjusted to indicate total "deposits" equal to total overdrafts covered as of the close of the previous business day. This was merely an accounting entry designed to reflect the bank's loss of use of the funds which had been applied to paying overdrafts. It seems that the bank charged no interest for providing this service.

It is unclear what, if any, limitations existed upon usage of the dummy account. Suffice it to say that Williams, as controlling shareholder and bank president, apparently enjoyed completely unhindered usage. We are here primarily concerned with the period from December 1977 to May 1978. Between December 20, 1977 and May 2, 1978, Williams drew many personal checks which were paid from the dummy account. By May 2, 1978, total overdrafts attributable to this activity had risen to $58,055.44. This was slightly in excess of 50% of the total overdrafts covered by the dummy account at that time. It is important to note that no other officer of the bank made use of the dummy account during Williams' presidency. Indeed, the bank's board of directors had requested that Williams

eliminate the dummy account but he failed to take any action.

On May 8, 1978, state and federal bank examiners arrived at the bank to conduct an audit. They rather quickly discovered Williams' heavy drawings upon the dummy account, but did not immediately approach him. Instead, they began discreetly to monitor Williams' personal banking activity during the next two weeks.

On May 8, 1978—the same day as the commencement of the bank examination—Williams opened a personal checking account at Winn State Bank, Winnfield, Louisiana, depositing $4,649.97. The deposit was posted to the account on May 9, 1978.

Also on May 9, 1978, Williams deposited in his personal checking account at Pelican Bank a check for $58,500 drawn upon his checking account at Winn Bank. This sum, of course, far exceeded Williams' actual balance in Winn Bank at the time. Pelican Bank thereupon credited Williams' checking account for the face amount of the deposited check. At the same time, Pelican Bank posted to Williams' checking account the group of checks which Williams had drawn from December 20, 1977 to May 2, 1978 and which had been cleared through the dummy account—$58,055.44 worth. The overdraft balance in the dummy account fell correspondingly. At the start of business on May 9, 1978, Williams' checking account at Pelican Bank showed a balance of $8.33. At the close of business, this figure had risen to $452.89.

On May 10, 1978, Williams deposited in his checking account at Winn Bank a check for $60,000 drawn on his personal checking account at Pelican Bank. Again, this sum far exceeded Williams' true balance in the drawee bank. Winn Bank thereupon credited Williams' checking

account for the face amount of the deposited check. At the start of business on May 10, 1978, Williams' checking account at Winn Bank showed a balance of $4,649.97. At the close of business, the balance had increased to $64,647.12 (a debit of $2.85 also having been recorded that day). As a result, Winn Bank routinely paid Williams' $58,500 check of May 9, given to Pelican Bank on that date, when it cleared for payment on May 12, 1978.

On May 11, 1978, there was presented for payment at Pelican Bank the $60,000 check which Williams had deposited in Winn Bank the day before. Because of insufficient funds in Williams' account, Pelican cleared the check through the dummy account. The overdraft balance in the dummy account rose correspondingly.

On May 16, 1978, Williams deposited in his checking account at Pelican Bank a check for $65,000 drawn upon his combined personal and business checking account at Sabine State Bank, Many, Louisiana. Williams' actual balance in Sabine Bank was only $1,204.81 at the time. Pelican Bank thereupon credited Williams' checking account for the face amount of the deposited check. At the same time, Pelican Bank posted to Williams' checking account the $60,000 check which Williams had deposited in Winn Bank on May 10, 1978 and which had been cleared through the dummy account on May 11, 1978. The overdraft balance in the dummy account fell correspondingly. At the start of business on May 16, 1978, Williams' checking account at Pelican Bank showed a balance of $102.89. At the close of business, the balance had risen to $5,102.89.

Because of insufficient funds in Williams' checking account, Sabine Bank refused to make payment on the $65,000 check when it was presented for payment on May 17, 1978. Pelican Bank charged Williams' account accordingly on May 23, 1978. Williams neutralized the charge-back by

depositing a $65,000 money order in his Pelican account the same day. Williams had purchased the money order from Sabine Bank with the proceeds of a real estate mortgage loan which he obtained from Sabine on May 18, 1978. Negotiations for the loan had presumably commenced some time earlier but it is not possible to determine from the record precisely when.

As a result of this intricate banking activity, Williams was able to obtain for his personal account at Pelican Bank interest-free credit of $58,500 from May 9, 1978 to May 12, 1978 and $65,000 worth from May 16, 1978 to May 23, 1978. Further, he was able to obtain interest-free credit of $60,000 at Winn Bank from May 10, 1978 to May 11, 1978. He was able to do so upon the basis of checks whose face amount uniformly exceeded the amount of funds backing them in his personal account at the drawee bank upon the date when given.

During their audit, lasting approximately two weeks, the bank examiners followed these activities closely. Eventually, they voiced numerous criticisms which culminated in a special meeting on May 26, 1978 in Shreveport between the Pelican board and state and federal banking officials. The state banking commissioner presided. He expressed his concern over the matters which had been brought to his attention and requested that Williams resign as president. Williams did so at once.

The United States Attorney in Shreveport—brought into the case *via* a criminal referral from FDIC—also was alarmed by Williams' conduct and obtained a one-count indictment on September 21, 1979. A superseding three-count indictment was obtained on October 19, 1979.

Count I charged that, "Beginning on . . . December 20, 1977 and continuing . . . to May 9, 1978 . . . William Archie

Williams, being an officer . . . of . . . Pelican State Bank . . . a bank the deposits of which are insured by [FDIC] . . . with intent to injure and defraud said insured bank, did willfully and knowingly misapply . . . monies and funds . . . of said bank, in the amount of $58,055.44 . . . by converting to his-personal use said sum, all in violation of [18 U.S.C. § 656 (1976)]. . . ."[1] This, of course, referred to Williams' sizable overdrafts during the period in question.

Count II charged that "On . . . May 9, 1978 . . . William Archie Williams, did knowingly and willfully overvalue . . . a security, that is a check dated May 9, 1978, drawn on the account of W. A. Williams . . . at the Winn State Bank . . . in the amount of $58,500.00 . . . for the purpose of influencing the Pelican State Bank . . . a bank the deposits

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1. The statute provides as follows:

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

of which are insured by [FDIC] . . . upon an advance of money and extension of credit in that the Defendant presented said check for deposit at Pelican State Bank . . . and represented . . . to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the Defendant then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank . . . to cover said check, all in violation of [18 U.S.C. § 1014 (1976)]. . . ."[2]

Count III charged under the same statute and for the same type of offense as in Count II, but applied to Williams' May 10, 1978 transaction at the Winn Bank.

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2. The statute provides as follows:

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

The cause came on for trial in federal district court in December 1979. The jury found Williams guilty on all counts. Judgment against him was pronounced on January 14, 1980. He received a prison sentence of six months as to Count III and five years probation as to Counts I and II together. This appeal followed.[3]

II

Appellant's first assignment of error concerns an evidentiary ruling made under the § 656 charge. He contends that the trial judge improperly excluded certain exhibits and testimony relevant to the issue of fradulent intent. It is our determination, however, that the trial judge properly exercised his discretion in refusing to admit the proffered evidence.

This circuit has identified the four essential elements of a violation of 18 U.S.C. § 656 (1976) as follows:

> (1) that the accused was an officer, director, etc. of a bank,
>
> (2) that the bank was connected in some way with a national or federally insured bank,
>
> (3) that the accused willfully misapplied the money, funds, etc. of said bank, and
>
> (4) that the accused acted with intent to injure and defraud said bank.

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3. There is also pending in this court an appeal from a post-conviction denial of Williams' motion for a new trial based on the ground of newly discovered evidence. *See United States v. Williams*, No. 80-3969 (5th Cir. Jan. 13, 1981) (order remanding to district court for consideration of Williams' motion for extension of time to file notice of appeal.)

United States v. Tidwell, 559 F.2d 262, 265 (5th Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978). *See supra* at 1314 n.1.[4]

An important component of Williams' defense to the §656 charge was to attempt to negative the intent element by showing as one of the relevant facts and circumstances that at all pertinent times he maintained credits at Pelican Bank which exceeded his drawings upon the dummy account. *See, e.g., United States v. Tidwell*, 559 F.2d 262, 266 (5th Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978); *United States v. Riley*, 550 F.2d 233, 236 (5th Cir. 1977); *United States v. Sorensen*, 330 F.Supp. 642 (D.Mont.1971). *But see United States v. Duncan*, 598 F.2d 839, 860 (5th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979); *United States v. Southers*, 583 F.2d 1302, 1305 (5th Cir. 1978).

Williams testified first for the defense. He stated that prior to the events in question Pelican Bank had entered into an agreement with General Motors to finance the purchase of new car inventory by Taylor Motor Company, a local car dealership. This was apparently a standard floor planning arrangement.

Williams further related that in November 1977 the Pelican board voted to terminate this financing relationship. General Motors purportedly responded that Pelican remained obligated on cars still in transit or already delivered. Williams testified that he then undertook to advance Pelican whatever funds would be necessary to meet

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4. The statute does not expressly mention the specific intent to injure and defraud. *See supra* at 1314 n.1. "Rather, the intent requirement has been judicially read into the statute on the basis of its legislative history." *United States v. Tidwell*, 559 F.2d 262, 265 n.2 (5th Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978); *see United States v. Docherty*, 468 F.2d 989, 994-995 (2d Cir. 1972).

the financing commitment to General Motors. Williams stated that he did so in order to avert a lawsuit which could have impeded the bank's chances to obtain approval for the opening of a branch in Mansfield, Louisiana. According to Williams, the bank's total indebtedness to him amounted to $77,000 by May 9, 1978 as a result of his undertaking.

On cross-examination, Williams admitted that he did not have any notes for the loans he had allegedly made to the bank. He also answered evasively when questioned whether the bank's records contained any entries proving his assertion that he was a substantial creditor of the bank.

Stephen Roberts, a certified public accountant, was next on the stand for the defense. He testified that he found that between December 1977 and March 1978 approximately $56,000 had been injected into the bank but he could not unequivocally identify the source of the funds. He also indicated that the bank held a corresponding note from Taylor Motor Company for each injection and that the notes totaled to an amount equal to the amount of injected capital.

On rebuttal, the Government first introduced F. N. Gallaspy, chairman of the board of Pelican Bank during the period December 1977—May 1978 and also chairman of the audit committee of the bank during that time (and president of the bank after Williams' resignation). When asked whether Williams had been a creditor of the bank during the December—May period, he replied: "No sir. The reverse was true."

Next in rebuttal, the prosecutor presented Ollie Stone, a cashier at Pelican Bank during the period December 1977—May 1978. He testified that to the best of his recol-

lection William Archie Williams had never been a creditor of the bank; instead, the reverse was true.

The prosecutor next called Ken Smith, a federal bank examiner who had participated in the audit of Pelican Bank in May 1978. He asserted that he did not discover any evidence at that time that Pelican Bank owed Williams large amounts of money.

Finally, the Government called Jessie Bridges, associated with Taylor Motor during the period in question. He testified that Taylor had owed Pelican a substantial amount of money during this period; to the best of his knowledge, however, Taylor had never been indebted to Williams. He stated that Taylor would give Pelican an interest-bearing note to cover the financing of each automobile. He indicated that he had no information that Williams may have been supplying Pelican with the funds it was using to meet its financing commitment on Taylor's inventory.

The trial judge held inadmissible a series of exhibits and accompanying testimony offered by appellant in support of his argument that he was at all relevant times in a net creditor position *vis-a-vis* Pelican Bank. The exhibits consisted of: 1) a letter of November 10, 1977 from Pelican to General Motors informing the latter that Pelican no longer intended to finance the purchase of new car inventory by Taylor Motors; 2) several promissory notes from Taylor Motors to Pelican Bank, dating from November and December 1977, each having a face value of several thousand dollars; 3) a number of bank money orders and bank memoranda, dating from December 1977 to March 1978, evidencing total payments during this period of $56,393.87 from Taylor's account at Pelican to General Motors; 4) miscellaneous documentation relating to Taylor's new

car purchases in the November—December 1977 period and the financing thereof by Pelican. The notes and payments are clearly related transactions, linked by Pelican's residual commitment to finance new car acquisitions by Taylor. The proffer indicates that cash was being injected into Pelican Bank during December 1977—March 1978 so that Pelican could honor its financing commitment. The proffer, however, contains no solid evidence as to the source of these injections.[5]

[1] Appellant contends that the exclusion of the above items constitutes reversible error as to the § 656 charge. Under Fed.R.Evid. 403, the trial judge has discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In our view, the trial judge properly exercised his discretion under Rule 403 to exclude the proffered evidence.

It is easily seen that the proffered evidence fails to shed any light upon the principal factual controversies left open by the evidence which was admitted: whether, and to what extent, William Archie Williams lent his personal funds to Pelican Bank so that it could meet its financing commitment to General Motors. Instead, the proffer is needlessly cumulative; that is, it merely leads to factual conclusions already amply supported in the record (and which the jury apparently discounted). Worse, the proffered evidence would likely serve as a source of confusion. The record would be cluttered with numerous details of business transactions only tangentially related to the question of Williams' overdrafts. In a case already

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5. Defendant's Offer of Proof; Supp.R.I.

abounding with detail, such a prospect becomes especially undesirable.

In short, procedural costs more than substantially outweigh probative value. The trial judge acted correctly in excluding the proffered evidence from consideration under the § 656 count.[6]

III

Appellant next excepts to the denial of his motion to suppress with respect to certain documentary materials allegedly obtained by the Government in violation of his Fourth Amendment rights. We are unable, however, to find any Fourth Amendment violation in this case.

In mid-1978, the U. S. Attorney in Shreveport and the FBI together undertook an investigation of Williams' personal banking activity. On October 12, 1978, FBI agent Thomas Ray arrived at Pelican Bank to speak with F. N. Gallaspy, then president of the bank and successor to Williams in this post (at this time, Williams' only official position at the bank was member of the board of directors). The meeting concerned an earlier request by Ray for any records in the possession of the bank which could prove useful to the investigation.

It had been established practice for the bank to hold Williams' monthly banking statements rather than mail them to him. Williams would come for them at random

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6. Appellant also contends that the exclusion of the proffered evidence represents reversible error as to the two § 1014 counts. The § 1014 counts relate to events which occurred on May 9 and May 10, 1978. The excluded evidence relates to events which transpired several months earlier. As such, the proffer was not relevant to the factual issues raised by the § 1014 counts. The trial judge acted properly in excluding the proffer from consideration under these counts. *See* Fed.R.Evid. 402, 403. We note that appellant's counsel conceded during the trial that the proffered evidence was irrelevant to the § 1014 counts.

intervals, sometimes months after the issuance of a statement. The statements were apparently kept in a wire basket located on a window ledge alongside the bank's main work space.

Preparatory to agent Ray's arrival, Gallaspy gathered from the window ledge five unsealed envelopes containing monthly checking statements, cancelled checks and deposit slips of William Archie Williams. The statements applied to Williams' checking activity at Pelican Bank from April through September 1978. Gallaspy delivered these documents to Ray after the latter's arrival. Gallaspy exercised custody over the documents by virtue of his position as bank president. Consequently, he had never actually sought Williams' permission.

Agent Ray had no search warrant covering the documents which came into his possession at Pelican Bank on October 12, 1978.

Before trial, Williams entered a motion to suppress, arguing that the Government's taking of his bank statements, checks and deposit slips represented a warrantless, illegal "search and seizure". An evidentiary hearing was conducted before a magistrate, who recommended that the motion be denied. The trial judge accepted the recommendation, finding that no reasonable or legitimate expectation of privacy had been violated. Williams now challenges the denial of his motion to suppress. We believe, however, that the lower court's rationale and result were sound.

[2] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Searches and seizures conducted without the prior issuance of a warrant "are *per se* unreasonable under the Fourth

Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *see, e. g., Johnson v. Wright*, 509 F.2d 828, 829 (5th Cir.), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 445, 46 L.Ed.2d 384 (1975). The Supreme Court has uniformly "held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *see Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).[7]

> This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," . . . - - - whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." . . . . The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" . . . - - - whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979).

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7. In this case, the actual taking of the banking documents was carried out by a private employee of the bank. This individual, however, acted at the request of the FBI. In view of this, he is to be deemed an "agent" of the FBI for purposes of this case, so as to render the taking of the documents governmental action under the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 739 n.4, 99 S.Ct. 2577, 2579, 61 L.Ed.2d 220 (1979).

The Supreme Court has squarely held that a bank customer has no legitimate expectation of privacy in the contents of original checks, deposit slips and financial statements pertaining to his account. *United States v. Miller*, 425 U.S. 435, 440-443, 96 S.Ct. 1619, 1622, 48 L.Ed.2d 71 (1976).

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U.S.C. § 1829b(a)(1)....

Id. at 442-443, 96 S.Ct. at 1624.

Further, we note that the Supreme Court has "consistently . . . held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2582, 61 L.Ed.2d 220 (1979). The same reasoning should apply when, as here, an individual voluntarily places his personal papers in the custody of a third party who is also recognized to be familiar with their contents. The individual "assumes the risk" that these papers will be turned over to the authorities for their examination. *Id.* at 744, 99 S.Ct. at 2582. While his confidence may have been betrayed, his "legitimate" or "reasonable" expectation of privacy has not been violated.

[3] *Miller* and *Smith, supra,* engender the following two conclusions pertinent to this case. First, Williams could entertain no legitimate expectation of privacy in the contents of the original checks, deposit slips and financial statements which he placed in the custody of Pelican Bank. Second, he could entertain no legitimate expectation that Pelican would not deliver these documents to the authorities for their perusal. These considerations effectively refute Williams' Fourth Amendment claim. No legitimate expectation of privacy has been invaded. The motion to suppress was properly denied.

IV

Appellant's next assignment of error relates to the alleged insufficiency of the indictment to charge violations of 18 U.S.C. § 1014 (1976). Section 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or . . . willfully overvalues any . . . property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation [FDIC] . . . upon any . . . advance . . . or loan . . . or extension of . . . the same . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both.

See supra at 1314 n.2. Appellant argues that the averments contained in Counts II and III[8] of his indictment cannot fairly be deemed to set forth violations of this statute.[9]

[4] This argument is simply without foundation. Williams' actions at Pelican Bank and Winn Bank on May

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8. *Supra* at 1315-1319.

9. Appellant at no time raised this argument before the court below; it is being raised for the first time on this appeal.

9 and May 10, 1978 constitute classic incidents of check kiting.

> "Check kiting . . . involves more than the mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the banks involved into a feeling of confidence and security. A bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. If credit is taken, that credit is usually drawn on immediately. The check kiter then deposits a check in the bank upon which the first check is drawn before the first check arrives there. The second check is drawn on the bank from which the first money or credit is received. Credit is taken for it and that credit covers the first check when it comes in and possibly additional credit. Then the process is carried on, back and forth, until the scheme is discovered."

United States v. Payne, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1079, 63 L.Ed.2d 319 (1980), *quoting Fidelity and Casualty Co. of New York v. Bank of Altenburg*, 216 F.2d 294, 302-303 (8th Cir. 1954), *cert. denied*, 348 U.S. 952, 75 S.Ct. 440, 99 L.Ed. 744 (1955). Recently, this court held that check kiting violates § 1014. *United States v. Payne*, 602 F.2d 1215, 1216 (5th Cir. 1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1079, 63 L.Ed.2d 319 (1980). Thus no question as to the sufficiency of the indictment can be raised.

V

All other arguments and exceptions raised by appellant, although not directly addressed by this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the record and the submissions of the parties, with oral argument of counsel, the judgment of conviction is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3064

D. C. Docket No. CR 79-50016-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM ARCHIE WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

MARCH 19, 1981

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3064

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM ARCHIE WILLIAMS,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion March 19, 1981, 5 Cir., 1981, ... F.2d .....)

(April 17, 1981)

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and Randall, Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court

*Judge of the United States Court of Claims sitting by designation.

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestions for Rehearing En Banc are also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert Ainsworth, Jr.
United States Circuit Judge

APPENDIX D

Question: At any time during your employment at the Bank did you see Mr. Williams furnish funds for and on behalf of the Bank to pay a draft for invoices for Taylor Motor Company? This would be either in cash or otherwise?

Stone: No, sir. I can remember Mr. Williams having some money in his bank box, his safety deposit box and buying a money order. I don't remember if it was Taylor Motor Company, it could have been but I just don't really remember.

Question: But that could likely have occurred?

Stone: It could very likely have.

[SR, I, p. 8 (excluded from evidence)].

* * *

Question: Okay. On the date as shown—on the page that is dated December 19, 1977, I see a notation here in Mr. Williams' name, right here (Indicating), Mr. Stone, can you tell me what that is? Would you interpret that bookkeeping system for the record?

Stone: Yes. Let me study this for a minute. This looks like American Bank carried eighty percent of this Taylor Motor funding and Mr. Williams carried twenty percent of it.

Question: That would be your interpretation?

Stone: Yes, sir. I cannot remember the intricate details of this thing, I am not sure exactly how this worked because it was pretty confusing—

Question: But that would be your interpretation?

Stone: Yes, sir.

[SR, I, pp. 9-10 (excluded from evidence)].

* * *

Question: Now if you assume that Taylor Motor Company was receiving automobiles and that the Pelican Bank was required to pay them, and Mr. Williams out of the goodness of his heart then put up thousands and thousands and thousands of dollars to pay for these automobiles, sir, how would that have been handled in the bank's books?

Stone: I don't know. With Mr. Williams handling it and us handling it—and one instance here. With this one right here I see what was done and that was basically that American Bank carried eighty percent of it and Mr. Williams twenty percent.

* * *

Question: And this is the only instance like this right here?

Stone: Well I don't know about that. There might be a few more like that in there.

[SR, I, p. 12 (excluded from evidence)].

APPENDIX E

Rule 403, Federal Rules of Evidence. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Title 18, United States Code, § 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank,

or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Title 18, United States Code, § 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Corp Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Adminis-

tration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Office - Supreme Court, U.S.
FILED
OCT 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER WILLIAM ARCHIE WILLIAMS

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STATUTE

18 U.S.C. § 1014 ..... 1, 2, 3

No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER WILLIAM ARCHIE WILLIAMS

As pointed out by the government in its supplemental memorandum, the United States Court of Appeals for the Third Circuit decided the case of *United States v. Sher*, No. 81-1317 (3d Cir. Aug. 14, 1981) on August 14, 1981. The court in *Sher* held that the presentation of worthless checks to a federally insured financial institution did not constitute a violation of 18 U.S.C. § 1014 and expressly declined to follow the contrary reasoning of the Fifth Circuit in *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). These decisions present a conflict between the circuits as to the meaning and application of 18 U.S.C. § 1014. Since Petitioner was convicted under *Payne's* interpretation of the statute on Counts II and III of the indictment, *see United States v. Williams*,

639 F.2d 1311, 1319-20 (5th Cir. 1981), the conflict presented by the contrary decision in *Sher* should be resolved by this Court in order to assure the uniformity of criminal prosecution throughout the *United States*.[1]

In *Payne* the Fifth Circuit agreed with the United States' contentions that a check is a "security" within the meaning of 18 U.S.C. § 1014 and that the presentation of a worthless check to a bank is a misrepresentation of the check's value. The Court stated that "[t]he bank's giving of immediate credit on the deposit of each check constitute[s] an extension of credit or a loan or an advance. The presentation of worthless checks to a bank, therefore, is a transaction intended by Congress to be covered by the statute." *United States v. Payne, supra* at 1217. The court specifically rejected the reasoning of *United States v. Edwards*, 455 F.Supp. 1354 (M.D. Pa. 1978), which held that such presentations are *not* false statements as defined by 18 U.S.C. § 1014.

Sher, however, directly contradicts *Payne's* analysis of the transactions which are within the purview of § 1014. In *Sher*, the Third Circuit expressly agreed with the district court's opinion below, which compared the interpretations of § 1014 contained in *Payne* and *Edwards* and adopted the latter. Although noting that *Payne's* logic had force, the district court said,

> [W]e cannot ignore § 1014's bare language, which is ambiguous with respect to the cashing of checks. Criminal statutes are to be strictly construed, and ambiguities resolved in the defendant's favor. *United*

---

1. There can be no doubt that Petitioner was convicted under the reasoning of *Payne*. In denying Petitioner's attacks on Counts II and III of the indictment on appeal below, the Fifth Circuit characterized his actions as "check kiting" and specifically cited *Payne* as holding that such activity violates § 1014. *United States v. Williams, supra* at 1319-20.

> *States v. Ortega*, 517 F.2d 1006, 1009 (3d Cir. 1975). We agree with the *Edwards* court that if Congress had intended to protect the institutions enumerated in § 1014 from check-kiting schemes, it would have done so explicitly.

United States v. Sher, 505 F.Supp. 858, 861 (W.D. Pa. 1981), *aff'd*, No. 81-1317 (3d Cir. Aug. 14, 1981).

Payne and *Sher* present a direct conflict concerning the interpretation of an important criminal statute which can be resolved only by this Court. Since Petitioner has been convicted in the Fifth Circuit of activities which are not criminal under the same statute in the Third Circuit, justice requires that this Court resolve the matter. To allow *Payne* and *Sher* to stand unreconciled would permit § 1014 to be applied one way to Fifth Circuit defendants and another way to Third Circuit defendants, despite the fact that the defendants stand in exactly the same position. Such a situation is intolerable in a nation which subscribes to equality under law. For this further reason, this Court should grant the Petition for a Writ of Certiorari sought by Petitioner.

Respectfully submitted,

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Attorney for Petitioner William Archie Williams

CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Supplemental Brief For Petitioner William Archie Williams by mailing three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This 30th day of September, 1981.

NICKOLAS P. CHILIVIS

Office-Supreme Court, U.S.
FILED
OCT 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER WILLIAM ARCHIE WILLIAMS

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FOR THE FIFTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER WILLIAM ARCHIE WILLIAMS

We wish to call the Court's attention to the fact that the petition for rehearing en banc filed by the government in *United States v. Sher*, No. 81-1317 (3d Cir. Aug. 14, 1981) was denied on October 6, 1981 and a certified copy of the judgment was issued by the Court of Appeals in lieu of a mandate on October 14, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I. Nicholas P. Chilivis, do hereby certify that I have this day served the within and foregoing Second Supplemental Brief For Petitioner William Archie Williams by mailing three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This ..... day of October, 1981.

NICKOLAS P. CHILIVIS

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2116

In the Supreme Court of the United States

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WILLIAM ARCHIE WILLIAMS,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed June 13, 1981
Certiorari Granted November 9, 1981

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The following opinion, judgment and order have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition For Certiorari:

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

WILLIAMS, WILLIAM ARCHIE

CR 79-50016-01

• • •

DATE	PROCEEDINGS
9–21–79	INDICTMENT-MINUTES; secret, bond set, warrant ordered.
	• • •
10–19–79	SUPERSEDING INDICTMENT - MINUTES; open, bond continued, summons ordered.
	• • •
12–10–79	TRIAL-MINUTES; 1st day. . . .
12–11–79	TRIAL-MINUTES; 2nd day. MOTION (deft.) for Judgment of Acquittal at close of Govt.'s case; DENIED
12–12–79	TRIAL-MINUTES; 3rd day. Court's Jury Instructions. . . . • • • VERDICT: GUILTY ON ALL THREE COUNTS. . . .
1–8–80	ISS. sent. cal. for 1-14-80 1:00 P.M.
1–14–80	RECEIPT, sent. cal. to deft. by Mrs. W.A. Williams on 1-12-80.
1–14–80	CONDITIONS OF Probation.
1–14–80	SENTENCING-Minutes, on superseding indictment—Ct. 3, 6 months custody, Cts. 1&2, imposition of sentence suspended, 5 years super. prob., recommendation that convinement (sic) be at

Federal Prison Camp, Maxwell AFB, Montgomery, deft. released on $2500 OR bond pending appeal. . . .

1–15–80 JUDGMENT, signed and distributed.

1–17–80 NOTICE of Appeal from sentence entered 1-14-80. . . .

(Filed October 19, 1979)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

CRIMINAL NO. 79-50016-01
(SUPERSEDING)

18 U.S.C. 656; 1014

UNITED STATES OF AMERICA

VS.

WILLIAM ARCHIE WILLIAMS

INDICTMENT
(Superseding)

THE GRAND JURY CHARGES:

COUNT I

Beginning on or about December 20, 1977 and continuing for a period to May 9, 1978, in the Western District of Louisiana, WILLIAM ARCHIE WILLIAMS, being an officer, that is, President of the Pelican State Bank, Pelican, Louisiana, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said insured bank, did willfully and knowingly misapply and cause to be misapplied monies and

funds of said bank, in the amount of $58,055.44, which had come under his care by virtue of his position as such officer, by converting to his own personal use said sum, all in violation of Title 18, United States Code, Section 656 and 2 (18 U.S.C. 656 and 2).

COUNT II

On or about May 9, 1978, at Pelican, Louisiana, in the Western District of Louisiana, the Defendant, WILLIAM ARCHIE WILLIAMS, did knowingly and willfully overvalue and cause to be overvalued a security, that is a check dated May 9, 1978, drawn on the account of W. A. Williams, Account No. 122-344-5-01, at the Winn State Bank and Trust Company, Winnfield, Louisiana, in the amount of $58,500.00 and payable to cash for the purpose of influencing the Pelican State Bank, Pelican, Louisiana, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, upon an advance of money and extension of credit in that the Defendant presented said check for deposit at Pelican State Bank, Pelican, Louisiana, and represented and caused to be represented to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the Defendant then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank and Trust Company, to cover said check, all in violation of Title 18, United States Code, Section 1014 (18 U.S.C. 1014).

COUNT III

On or about May 10, 1978, at Winnfield, in the Western District of Louisiana, the Defendant, WILLIAM ARCHIE WILLIAMS, did knowingly and willfully overvalue and cause to be overvalued a security, that is a check, dated May 10, 1978, drawn on the account of W. A. Williams at

the Pelican State Bank, in the amount of $60,000.00 and payable to W. A. Williams for the purpose of influencing the Winn State Bank and Trust Company, Winnfield, Louisiana, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, upon an advance of money and extension of credit in that the Defendant presented said check for deposit at the Winn State Bank and Trust Company and represented and caused to be represented to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the Defendant then well knew, there were no sufficient funds in the account of W. A. Williams at the Pelican State Bank to cover said check, all in violation of Title 18, United States Code, Section 1014 (18 U.S.C. 1014).

A True Bill:

/s/ K. R. Allen
Foreman

/s/ J. Ransdell Keene
J. Ransdell Keene
United States Attorney

/s/ Brian P. Joffrion
Brian P. Joffrion
Assistant United States Attorney

By: /s/ A. M. Stroud, III
A. M. Stroud, III
Assistant United States Attorney

(Filed March 11, 1980)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CAUSE NO. CR 79-50016-01

Volume I

UNITED STATES OF AMERICA
Plaintiff

-versus-

WILLIAM ARCHIE WILLIAMS
Defendant

TRIAL COURT:	HONORABLE TOM STAGG, JUDGE
TRANSCRIPT:	REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS IN ABOVE CAUSE
LOCATION:	UNITED STATES DISTRICT COURTHOUSE SHREVEPORT, LOUISIANA
DATE:	December, 1979
TRANSCRIPT FILED:	3/11/80
ORDERED BY:	Mr. BILL CADY, DEFENSE ATTORNEY

BILL HOGAN, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
POST OFFICE BOX 441, SHREVEPORT, LOUISIANA
(318) 226-5293

APPEARANCES:

FOR THE GOVERNMENT:

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Mr. Marty Stroud
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FOR THE DEFENDANT:

Mr. William Cady, III
Attorney
808 Beck Building
Shreveport, Louisiana

Mr. Martin S. Sanders Jr.
Attorney
P.O. 190
Winnfeild, Louisiana

BE IT REMEMBERED that in the United States District Court for the Western District of Louisiana, Shreveport Division, in the United States Courthouse, in the City of Shreveport, Parish of Caddo, State of Louisiana, on the term December, 1979, the above entitled cause came on for trial before the Honorable Tom Stagg, Judge of said Court, and the proceedings on the trial are in the words and figures following, to-wit:

WITNESS: F. N. GALLASPY

Direct Examination

• • •

[9] 27 Q. Were any—you previously testified that some of Mr. Williams' checks were paid out of the dummy account. In May of 1978, approximately in what amount were his items or his checks paid? A. $60,000, or there about.

28 Q. Did you ever discuss the dummy account with Mr. Williams? A. Yes, sir.

29 Q. And, what was the nature of your discussion with him? A. I tried to impress upon the seriousness of it, and to make him realize what might come about as a result of a continuation of that practice.

30 Q. Did the Board ever ask him to do away with the dummy account during the period of time that he was the President? A. Yes, sir.

31 Q. And, did he? A. No, he did not.

32 Q. Were you present at the bank during the course of an examination in May, 1978, conducted by the state and federal examiners? A. Yes, sir.

33 Q. Did Mr. Williams tender a check to be deposited [10] in his account which was used to clear a number of his personal checks out of the dummy account? A. Yes, sir.

34 Q. And, and, on what bank was that item drawn? A. The Winn State Bank.

THE COURT: Mr. Marshal, would you turn that (indicating). Are you going to ask the witness questions about that exhibit.

MR. JOFFRION: Yes, your Honor.

THE COURT: Mr. Cady, would you come look at the exhibit, please.

(CONFERENCE AT THE BENCH)

THE COURT: Mr. Marshal, would you turn the stand this way so that the witness can see it? Now, if you'll put the exhibit on the stand that will be fine.

35 Q. Mr. Gallaspy, would you review the documents on that board, please?

(CONFERENCE)

THE COURT: Mr. Hogan, note that the objection is made general to the document.

Would you be specific with your questions.

MR. JOFFRION: I've asked the witness to review these items on the board, Your Honor.

* * *

Cross Examination

* * *

[16] 66 Q. That was the Gravamen of my inquiry. Mr. Joffrion questioned you with regard to a check on the Winn State Bank up here; (indicating) did you, be careful; listen to me carefully. Mr. Gallaspy, did you personally receive this check from Mr. Williams or did some other officer of the bank receive possession of this check from him? Or do you remember? A. I don't remember it specifically but it would not have been in order for me to receive it. I didn't receive deposits. It was some employee or maybe some other officer.

67 Q. The reason I ask that is because—I don't think you meant it to but my appreciation of your testimony was that you personally received that check. That is not true. Is it? A. I didn't receive it, in that he gave it to me.

68 Q. The banker Williams didn't hand the check to you, sir— A. No, the bank received it.

* * *

WITNESS: OLLIE STONE

Direct Examination

• • •

[30] 136 Q. On or about May, 1978, did Mr. Williams make a deposit of approximately $58,500 to his personal checking account. A. Yes, sir.

137 Q. Did you handle this deposit for him? A. Yes, sir, I did.

138 Q. Was it at his direction? A. Yes, sir.

139 Q. Was he given credit as a result of this deposit? A. Yes, sir.

140 Q. And, was he given credit for the face amount of the check? A. Yes, sir.

141 Q. After this deposit was made, were a number of checks which had been paid by the bank through the dummy account then credited to his own account? A. Yes, sir.

142 Q. Was this during the examination by the federal and state examiners in May, 1978? A. Yes, sir.

• • •

[32] 143 Q. Had the state examiners, or did the state examiners express any concern to you about the dummy account? A. Yes, sir.

THE COURT: Did they?

A. Yes, sir.

144 Q. Did a $60,000 check drawn on Mr. William's Pelican State bank account subsequently come through for payment? A. Yes, sir.

145 Q. Was a deposit made by Mr. Williams on or about the date that the $60,000 item came in for clearing? A. Yes, sir.

146 Q. And what was the amount of that deposit? A. $65, I believe was the amount—$65,000

[33] 147 Q. And was that $65,000 item ultimately returned to Pelican? A. Yes, sir.

148 Q. Was a subsequent $65,000 deposit made by Mr. Williams? A. Yes, sir.

149 Q. At this time I will ask you to look at the board and review the items on the board. I am going to ask you some questions about these items after you have reviewed them. I will call your attention now to check

(CONFERENCE)

THE COURT: Let the witness continue to look at the exhibit.

150 Q. Mr. Stone, I will call your attention, at this time, to a $58,500 check drawn on the account—on an account at the Winn State Bank signed by W. A. Williams. And, a deposit slip made out in the amount of $58,500 indicating a deposit made to the Pelican State Bank. Can you identify that check and that deposit? A. Yes, sir.

151 Q. Did you write out that deposit slip? A. I did.

152 Q. And is this the check that you deposited? [34] A. It would appear that way, yes, sir.

153 Q. I will also call your attention to a $60,000 check drawn on the Pelican State Bank. Is this $60,000 check the check you referred to in your testimony? I will also call your attention to a $65,000 deposit slip in the name of W. A. Williams. Did you make out this deposit slip? A. Yes, sir, I did.

154 Q. And is this the second deposit that you referred to in your testimony? A. That's correct.

155 Q. Next to this deposit slip there is a notice of not sufficient funds. Are you familiar with that item? A. Yes, sir.

156 Q. Is the $65,000 check referred to in the Pelican State Bank deposit ticket the check that was ultimately returned. A. Yes, sir.

* * *

Discussion by Court

* * *

[42] THE COURT: I'm, I have the extentional elements before me on Section 656.

MR. JOFFRION: Your Honor, the Government need only prove the official elements; whether or not the bank sustained a loss is not relevant.

THE COURT: Mr. Joffrion, I'm reading the essential elements from this chart in front of me states that the Government has to prove and they have to tell the jury—I have to tell the jury that the Government has to prove first, that the accused was an officer of a bank; second, that the bank was insured; third, that the accused willfully misapplied the funds or monies of the bank; and fourth, [43] that the accused acted with the intent to injure and to defraud the bank. There are specific cases that say what a banker can or can't do with respect to a bank and not be considered in law to have intended to injure the bank. In the 1014 Section, there are two essential elements that the defendant made knowingly a false statement or report concerning a material fact to a bank. Secondly, that he made the false statement or report wilfully and with intent to influence the action of the bank. I think I need to give the limiting instructions to the jury at this time, and I intend to do so. To which ruling by the court at this time, the defendant, or counsel on behalf of the defendant does stoutly object.

* * *

[51] * * * On the other charge, under Section 1014, they simply have to prove that the defendant knowingly made a false statement to a bank that was insured, with the intent to influence the action of that bank. Whether the bank lost money—The government doesn't have to prove that. I do believe that the evidence of the

actual financial effect on the bank can be considered by you to determine whether the defendant had the necessary intent to defraud the bank. Now with that brief limiting instruction, Mr. Cady can now continue with his cross-examination of the witness. In case you've forgotten his name; his name was Ollie Stone and Mr. Stone was at the time the cashier of the Pelican State Bank. Mr. Cady, you may continue with your questions to this witness.

* * *

Cross Examination

* * *

[55] 188 Q. This $58,000 check that you talked with Mr. Joffrion about earlier, I noted it is made to cash. Would you tell the circumstances of how that check was deposited? A. Mr. Williams gave it to me and asked me to deposit it.

189 Q. I want you to be real careful about this, sir. Did he ask you to just hold it and then he was going to go to Winnfield and close out another transaction that would cover it? A. He could have, but I don't really remember it that time. I just remember a check.

190 Q. I'm not trying—this isn't a trick question. I'm trying really to determine if my interpretation is possible? A. It's possible, I don't really remember it.

191 Q. If I were able to show you additional documents that may bear that out then you would be able to accept that. Is that correct? [56] A. Yes, sir.

192 Q. Was there any ultimate loss sustained by the bank, taking the check up here February, May 9, 1978, and all these transactions down on through May 23, 1978. Was there any net financial loss to the bank. A. No, sir. Other than the fact that we didn't have that $58,000 to use.

193 Q. In other words, an interest possible loss? A. Right.

194 Q. If I compensated the interest someplace else there was no loss. Is that correct? A. That's correct, yes, sir.

MR. CADY: That's all, thank you. Wait a minute, excuse me.

(CONFERENCE)

195 Q. I believe you testified that you made this deposit slip depositing this check? Is that correct? A. Yes, sir.

196 Q. Again, a trick question, I'd like to know the answer. The deposit slip is dated May 8th and the check is dated May 9th. Was there [57] any reason for that? A. I can't really remember or recall other than it might have been after hours, the deposit slip would have had to go in on the 8th at work and the check could possibly have been brought in later—I'm not real sure.

197 Q. In other words, the check could have been brought in really after the deposit slip then if it's dated that way. A. That's correct.

198 Q. Do you remember whether you typed this check, I notice it's— A. No, sir, I didn't.

199 Q. It was handed to you typed and signed by Mr. Williams? A. The best I can remember I didn't type it.

MR. CADY: Thank you, sir.

Redirect Examination

200 Q. Mr. Stone, did you make deposits to Mr. Williams' account on more than one occasion? A. Yes, sir.

201 Q. Would you make these deposits at his instructions? [58] A. Yes, sir.

202 Q. Do you recall anything else other than him giving you this check and instructing you to deposit it in his account? A. That's all I can remember about it.

203 Q. If Mr. Williams gave you a check and told you not to deposit it in his account would you have deposited it in his account? A. No, I wouldn't.

204 Q. Mr. Cady asked you about whether a loss was sustained by the bank and you testified that the loss to the bank was the use of these funds. Is that correct? A. Yes, sir.

205 Q. Didn't the bank, in fact, lose the use of these funds from the date that the check originally came to the bank? A. The date the checks came to the bank.

206 Q. What period of time is involved? A. December to May, is that what you refer—

* * *

WITNESS: DAN BOWKER

Direct Examination

* * *

[62] 220 Q. Were you the President in May, 1978? A. Yes, sir.

221 Q. Are you familiar with an individual named William Archie Williams? A. Yes, sir.

222 Q. Were you familiar with him in May, 1978? A. Yes, sir.

223 Q. In May, 1978, did you handle a $60,000 deposit for William Archie Williams? A. Yes, sir.

224 Q. Was that on or about May 10, 1978? A. Yes, sir.

225 Q. Did you fill out the deposit slip? A. Yes, sir.

226 Q. Did you do this at Mr. Williams' direction? A. Yes, sir.

227 Q. In what form was the $60,000 deposit? A. It was a check on the Pelican State Bank.

228 Q. I call your attention to this board. Specifically this check for $60,000 drawn on the Pelican State Bank made out to W. A. Williams and a deposit slip on the Winn State Bank for [63] $60,000. Is this the check and deposit slip you referred to in your testimony? A. To my best recollection, yes, sir.

229 Q. And I'm going to show you a Winn State Bank statement.

THE COURT: You want to go over there and look, Mr. Bowker?

WITNESS BOWKER: No, sir.

230 Q. I'm going to ask you to look at these items, I'm going to ask you some questions. A. Okay.

231 Q. Also ask you to look at this Winn State Bank check. Mr. Bowker, after the deposit was made did your bank give Mr. Williams credit based upon this deposit? A. Yes, sir.

232 Q. And, did you give him credit or extend credit to him based on the face amount of the check for $60,000? A. We credited his account for immediate credit.

* * *

WITNESS: JAMES R. COLE

Direct Examination

* * *

[67] QUESTIONS BY MR. JOFFRION:

249 Q. Mr. Cole, would you please give your full name, where you're from, and your occupation, please? A. James R. Cole, my home address is Route 2, Box 706, Many, Louisiana, 71449. I'm employed at the Sabine State Bank & Trust Company, Many, Louisiana, as Executive Vice-President.

250 Q. Were you so employed from and including December 1977, through May, 1978? A. Yes, sir.

251 Q. During that period of time did you personally handle any bank business involving William Archie Williams? A. Yes, sir.

252 Q. Did you have occasion in May, 1978, to prepare a deposit slip for Mr. Williams. A. Yes, sir.

253 Q. And what was the basis of that deposit? [68] A. A loan.

254 Q. And when was that loan made? A. I believe May 18th.

255 Q. In what amount was the loan? A. $65,000.

256 Q. I'm going to call your attention to documents on the board, specifically, a statement from the Sabine State Bank on the account of Mr. Williams, a deposit slip, a check dated May 23, 1978 for $65,000. I'm going to ask you some questions about these documents in addition to a money order made out to Mr. Williams with the remitter as Mr. Williams. Is that deposit slip the deposit slip you just referred to? A. The deposit slip dated May 18th to the account of Melody Ranch is the deposit slip I was referring to, yes, sir.

257 Q. And, is that money order a result of that deposit? A. No, sir. The money order is the result of the check.

258 Q. I'm sorry was there a check on that date, on [69] May 23rd for $65,000. A. On May 23rd there was a check.

259 Q. Was that check used to purchase the money order? A. Yes, sir.

260 Q. Prior to that check for $65,000 being debited was there another check for $65,000? A. Yes, sir.

261 Q. That came to the bank drawn on that account? A. Yes, sir.

262 Q. And, do you have a copy of that check with you? A. Yes, sir.

263 Q. Would you produce it, please?

(CONFERENCE)

264 Q. Mr. Cole, how was that check dated? A. Would you repeat that, please?

265 Q. What was the date on that check? A. May 16th, 1978.

266 Q. What is the amount? A. $65,000.

267 Q. When was the loan for the $65,000 made to Mr. Williams? A. May 18, 1978.

268 Q. On May 16, 1978, what amount of money did Mr. [70] Williams have in his bank account? A. Between $1,000 and $2,000, I can't read—

269 Q. He did not have $65,000? A. No, sir.

270 Q. Was that check subsequently returned to the Pelican State Bank? A. Which check are you referring to?

271 Q. The check that is before you. A. This one.

272 Q. Dated May 16th? A. It was returned to the Pelican State Bank.

273 Q. For what reason? A. Non-sufficient funds.

274 Q. Do you have any records concerning the return of that check? A. I have a copy of the remittance.

275 Q. Would you produce that, please? A. Yes, sir.

276 Q. Is the $65, $65,000 item listed on this slip, the May 16th check? A. Yes, sir.

277 Q. On May 16, 1978, was this $65,000 check a worthless check? [71] A. Yes, sir.

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Cross Examination

* * *

[75] 280 Q. Was covered by the deposit you made to Mr.—to that Melody Ranch, is that not correct, the $65,000. A. No, sir, that check was returned to Commercial National Bank.

281 Q. Did, as a result of this check, did you lose $65,000 is what I'm trying to say? A. No, sir.

282 Q. You got, in fact, after this check you, probably prior to this check you lent him $65,000 on the 18th, is that not correct? A. That is correct, yes, sir.

283 Q. What was, that loan was a real estate mortgage loan? A. Yes, sir.

284 Q. To make a real estate mortgage loan, doesn't the bank have to get a mortgage, and a note, and possibly a title opinion, a mortgage certificate, and several items to show that that's a good loan? A. Yes, sir.

285 Q. You didn't just wake the morning of the 18th [76] and decide to lend Mr. Williams $65,000? A. No, sir.

286 Q. It was, just judging by, because I've done this work for banks myself, it takes a certain amount to do it. I imagine the loan was in the mill at the time this check was written. Would that not be so? A. I would think so, yes, sir. As far as negotiations?

287 Q. Yes, sir. A. I think that is absolutely correct. Yes, sir. As of May 16th is the date you're referring to.

288 Q. Yes, sir. A. Right.

289 Q. It would not have been unreasonable for him to have anticipated at that time that he could cover this check, because he was negotiating a loan with you for $65,000, right? A. That is correct.

* * *

[78] 295 Q. Thank you. I didn't mean to cut you off, go ahead A. It was not entirely worthless. The question was on that date was that check—

296 Q. I understand, but I just wanted to— A. Okay.

297 Q. Show that that man's signature was worth something because you lent him $65,000. Right? A. Yes, sir.

MR. CADY: Thank you, sir.

Redirect Examination

QUESTIONS BY MR. JOFFRION:

298 Q. Did Mr. Williams have $65,000 in the bank on May 16th? A. No, sir.

299 Q. If this check would have arrived at the bank on May 16th would the balance that he had on May 16th, what would you have done with it? A. It would have been returned insufficient.

300 Q. Notwithstanding his signature was on it? [79] A. It was returned insufficient.

MR. JOFFRION: Thank you, sir.

THE COURT: Any further questions, Mr. Cady?

MR. JOFFRION:

301 Q. After the $65,000 was deposited as a result of a loan, weren't checks returned including a $65,000 check, marked insufficient funds? A. To my knowledge that's the only check that was returned.

302 Q. The $65,000 check? A. Yes, sir.

303 Q. Notwithstanding the $65,000 deposit, he still had insufficient funds to cover the check. Isn't that correct? A. That is correct.

* * *

[87] WITNESS: TOM RAY

Direct Examination

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THE COURT: He will only explain the items on the chart plus their relation to each other and then he has to sit back down again.

A. On May 8, 1978, the balance in the dummy account at the Pelican State Bank in Pelican was $117,-672.11 in an overdraft status. As of that date Mr. Williams in his personal checking account at the Pelican State Bank has a balance of $8.33. On May 9th this group of checks here (indicating) totaling $58,065.44 and dating from December 20, 1977, through May 2, 1978, were all cleared through the personal checking account of Mr. Williams. I'm sorry through the personal checking and [88] removed from the overdraft balance in the dummy account, which reduced the balance in the dummy account from over $117,000 down to something over $53,000. There were evidently other items involved in clearing out the dummy account that date other than the $58,065.44 items. In order to be able to post these checks, charge these checks to his personal account, there had to be something in there other than a balance of $8.33. On May 9th, the same date that these checks were charged to his account there was a deposit made to his account of $58,500. It consisted of a check written by Mr. Williams on his personal account at the Winn State Bank in Winnfield in the amount of $58,500, which went with this deposit slip prepared by Mr. Ollie Stone. It was posted to Mr. Williams' personal account on May 9th. Mr. Williams wrote a personal check on May 10th on his personal checking account at Pelican State Bank and it was put with the deposit slip prepared by Mr. Bowker of the Winn State Bank, [89] which was posted to his account at the Winn State Bank of Winnfield on May 10th.

This check that was written on Mr. Williams' account of the Pelican State Bank covered this $58,500 check which he had written and deposited at the Pelican State Bank. This would have caused his personal checking account at the Pelican State Bank to again go in overdraft status without the deposit of the $65,000 check which Mr. Cole testified. Mr. Cole had a copy of that check which was written on the account on Mellow Day Ranch, W. A. Williams, at the Sabine State Bank in Many. That $65,000 check was put with a deposit slip which was written by Mr. Stone at the Pelican State Bank. It was deposited to Mr. Williams' personal account on May 16th. Several days later on May 23rd that $65,000 check written on Melody Ranch, W. A. Williams account at Sabine State Bank was charged back to his account as a non-sufficient funds check; because he had insufficient funds at Sabine State Bank in his Melody Ranch account to cover that check. On the same day [90] on May 23rd, a bank money order from the Sabine State Bank in Many was placed for deposit and was filled out by Ollie Stone. This deposit slip was in the amount of $65,000 was credited to Mr. Williams' account, which ultimately took care of covering the checks which were all cleared through his account on May 9th.

330 Q. Mr. Ray, other than the checks that you have alluded to during your testimony, were there any other credits that you found to be good credits in the amount sufficient to cover these $58-65,000 in checks until May 23rd? A. No, sir.

331 Q. What is the term that is used to describe this type of activity? A. Check kiting.

332 Q. What is the effect of check kiting? Or the purpose of check kiting? A. The purpose of check kiting is to buy time by writing checks on two or more banks when you have insufficient funds in both of them and buy the time that it takes for the checks to [91] clear between

the various banks. It's a form of unsecured loan from the banks.

333 Q. Did your examination of the records indicate whether there was sufficient funds on the day that the $58,500 check was written to cover that check? A. This is at Winn State Bank?

334 Q. The date that that check was written, was there sufficient funds at Winn to cover it? A. No, sir.

335 Q. Were there any funds at Winn other than the initial $4,600 deposit? A. No, sir.

336 Q. The $60,000 deposit that was later made, were there any funds to support that check in Pelican? A. No, sir.

337 Q. For the period of time between May 9th and May 23rd credit was really created by the circulation of these items? A. Yes, sir, unsecured credit.

MR. JOFFRION: We tender this witness, Your Honor.

* * *

WITNESS: DON RICE

Direct Examination

* * *

[95] 355 Q. Let me rephrase the question. During the examination did you come into contact with the account of one, William A. Williams? A. Yes, sir.

356 Q. Who brought this account to your attention? A. One of the assistants, who was assisting on the examination. The assistant examiners normally balance, make sure that all assets of the bank are accounted for, except for the loans, during the examination.

357 Q. After the account was brought to your attention, what, if anything; did you do? The account of Willie Williams. A. She brought roughly $58,000 in cash items that had been held by the bank apparently since—Some

of the individual items had been held since December, 1977. Of course, we were concerned because a bank normally has 24 hours, until midnight of the next business day to [96] return these items. If they do not return these items by midnight of the next business day, then they become an asset of the bank.

358 Q. Did you begin to monitor the Williams' account? A. Yes, I did.

359 Q. During the time that you monitored the account did any activity occur on it that caused you concern? A. The examination started on May 8th. On May 9th, there was a deposit to Mr. Williams' account for $58,500. The cash items were debited against this deposit.

360 Q. I'd ask that you approach the chart now and take this pointer. I'd ask you to refer to the Williams account, W. A. Williams' account. Do you see the $58,500 amount, this appears after the credits to those accounts. What happened after you saw that credit? Did that credit concern you in any manner? A. To the extent that since these items did represent bank assets, and credits are bank assets normally; that's the way we look at it. We did want to make sure that this was a good [97] item, and that the funds, that the check would not be returned.

361 Q. How long did you stay at the bank? A. Approximately 2 weeks.

362 Q. Was that item returned? A. That item was not returned, however a check, this was the deposit of the check on the Winn State Bank; roughly two days later a check drawn on the Pelican Bank deposited to Mr. Williams' account at Winn State Bank was returned. It was drawn on unrelated funds as you can see at this point in time, that the check was written, the balance in the account was roughly $100 to $400.

363 Q. In what amount was that? The check you referring about? A. The $60,000 check.

364 Q. Did anything else happen on that date to cause any type of concern, May 16th? A. This was roughly two days after the $60,000 item appeared and it was apparently held in the dummy account. Then, eventually on May 16th there was a $65,000 check deposited [98] to the account and a $60,000 check was debited to the account, offsetting the entry.

365 Q. Still, we're interested at this point in collected funds. We still want to be sure that the $65,000 was collected. Did you monitor the flow of the $65,000? A. Yes, sir.

366 Q. What, if anything, happened to that? A. The bank was advised by correspondence from Commercial National Bank on May 18th that account was in the process of being determined.

367 Q. What happened after that? A. At that particular point I kept up with the outcome more or less by telephone, conversation with Mrs. Cathey or Stone. We left the bank and completed our examination the last two days of the second week outside the bank.

368 Q. Sir, based on your investigation and examination, did Willie Archie Williams have sufficient funds in the Pelican State Bank between May 9th and 23rd to cover the checks written on his account? A. No.

[99] 369 Q. Why not? A. Because the funds are not collected if the checks are returned to the bank.

370 Q. Based on your prior experience and training as a bank examiner, did you form an opinion about the activities on the Williams' account at the Pelican Bank? A. It appeared that he was buying some time to cover the items.

371 Q. Why do you say this? A. As a normal procedure, as I explained before, items appear in banks quite often but they're covered; not quite often, sometimes, but if they're covered with checks and we always monitor to

make sure that the check doesn't come back or anything representing the check comes back. Until a check is deposited to the account, sent to a correspondent bank, and clears, are those items paid, or they're collected funds.

MR. JOFFRION: I tender the witness.

* * *

WITNESS: KENNETH SMITH

Direct Examination

* * *

[104] 387 Q. Was the account brought to your attention? A. Yes.

388 Q. After you saw this account, did you have occasion to go to Sabine State Bank? A. Yes, I did.

389 Q. Why did you go to the Sabine State Bank? A. Mr. Williams had deposited a check in his account at the Pelican State Bank drawn on the Sabine State Bank that we had serious questions about. We, meaning Mr. Rice and I.

390 Q. Sir, I ask that you step down and approach this chart. I'll give you the pointer and ask you to look at the account of W. A. Williams and indicate on this chart the check about which you had concern. A. The check that we had the primary concern about was this check right here (indicating) for $65,000.

[105] 391 Q. And, why did you have concern? A. In the other checks that we had seen come and go through this account, we; of course were already had some question in our mind about the items in here. This check we just didn't feel like the check was any good.

392 Q. Did you ascertain whether that check was any good? A. Yes, I did, on the afternoon of May 16th. I drove to the Sabine State Bank in Many, and

went into the bank and checked the records of the Sabine State Bank.

393 Q. What, if anything, did you find? A. The check was drawn on Melody Ranch account which was Mr. Williams' account in the Sabine State Bank. I went into the bank's bookkeeping department and checked the computer printouts of his account and ascertained that he didn't that money, that much money on deposit in the bank.

394 Q. Did you ever check the $60,000, the $58,500 check? A. No, sir.

[106] 395 Q. The other two checks? A. Yes. This $58,500 check was drawn on Mr. Williams account at the Winn State Bank in Winnfield, and later on, the same week after I believe I had been to the Sabine State Bank, I had occasion to visit the Winn State Bank and I went into the bookkeeping department and checked to see if this transaction was a valid one.

396 Q. What, if anything, did you find? A. I found out that he did not have the funds at the time the check was written. It was an insufficient fund check.

397 Q. How did you arrive at that conclusion? A. Well, I checked his account and I believe this is the statement right here (indicating) and he did not have the funds on the date the check was written.

398 Q. Based on your investigations, did William Williams have sufficient funds in the Pelican State Bank between May 9th and May 23rd, 1978 to cover the checks written on his personal account? [107] A. No, sir, he didn't.

399 Q. Why not? A. His account was actually in an overdrawn position during that period of time, although it's not reflected on the account.

400 Q. Based on your investigation, did the defendant obtain instant credit by overvaluing securities presented to the Winn Bank? A. Yes, he did.

401 Q. And, to the Sabine Bank? A. Yes, he did.

402 Q. Based on your prior experience as a bank examiner did you form an opinion as to the activities of the defendant on these 3 accounts? A. Yes, I did.

403 Q. And, what is that opinion? A. That it was a kite.

404 Q. Again, briefly, what is the basis for that opinion? A. A kite is the drawing of checks when you don't have the funds available to cover them. This is basically exactly what was done. He didn't have the funds available at the Sabine State [108] Bank or the Winn State Bank at the time the checks were written.

405 Q. One final question, the $60,000 check at Winn Bank, was that overvalued? A. Yes, it was.

* * *

[114] *Redirect Examination*

QUESTIONS BY MR. JOFFRION:

437 Q. Did the Pelican Bank lose any money as a result of this?

Let me rephrase the question. Did they lose the use of their money? A. Exactly.

438 Q. Is this the essence of a kite? I mean is this the effect a kite has on a bank? A. Yes.

439 Q. What money did the Pelican Bank lose the use of? A. It lost the use of the money that was in this dummy account, and the amount of these checks that were flowing, too.

440 Q. In your opinion did this scheme have a detrimental effect on the bank? A. Yes.

441 Q. Why? A. It lost the income that he could have generated had it had these funds available for it's use.

MR. JOFFRION: No further questions.

[115] *Recross-Examination*

QUESTIONS BY MR. SANDERS:

442 Q. Mr. Smith, do you have any conversation with Mr. Williams himself while you were at the bank? I'm looking for a yes or no answer, I haven't asked you what the conversation was about. A. You asked me have I ever had—

443 Q. Let's say when you started your audit on May 8th. A. I'm going to say yes.

444 Q. Did you have any conversation with him on the 9th? A. I don't remember.

445 Q. Did you have any conversation with him before you went to the Sabine State Bank? A. Concerning what?

446 Q. Concerning looking at his account there. A. None that I recall.

447 Q. Did you ever ask him whether the check drawn on the Sabine State Bank was good? A. No.

MR. SANDERS: That's all I have.

* * *

DISCUSSION BETWEEN COUNSEL AND COURT

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[150] THE COURT: Mr. Cady, describe for me, if you will, sir, the different kinds of proof or the different levels of proof, if they are different, in the intent phrase of your argument under Section 656 versus the intent, if any, requirements in 1014.

MR. CADY: I'm not sure I understand your Honor. You want me to explain what evidence gave—

THE COURT: You can speak to your partner about that. He's been reading those other briefs, but I don't think you will find that there is a same intent requirement

in statue 1014 as it is in the statue 656. Mr. Sanders you may rise and say your piece.

MR. SANDERS: I thought I would ask, your [151] Honor, I think that the only intent required in 1014 is to knowingly make a false statement and you do that intentionally and the intent of course, in 656 being the intent to defraud. Is that what your Honor is speaking of?

THE COURT: That's correct. In the two counts, count II and III injury to the bank isn't a factor. You can do that without ever having brought up the question of does it injure the bank. You complete the offense if the jury finds by simply the doing of.

MR. SANDERS: It's knowingly making a false statement.

THE COURT: Correct.

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STATEMENT BY COURT

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[163] THE COURT: I'm glad cases like this come along and I'm also glad that lawyers like these come along cause there's nothing as easy— I have now reread Tidwell, I've gone over marked copy of Southers and I even went to look to see if there was any comfort in Pouche'. The law it seems to me is now clear in this circuit anyway that the requisite intent needed in a section 656 offense can be inferred from the facts offered at trial. This intent exisits, as Tidwell put it, if a person acts knowingly and if the natural result of his conduct would be to injure or defraud the bank even though this may not have been his motive. And further from that, that was quoting from U. S. versus Smith. Then this quote from Golden, citing Galbrith, an intent to injure or defraud is not inconsistent with the desire for the ultimate success and

welfare of the bank. A wrongful misapplication of funds even if made in the hope or belief that the bank's welfare would ultimately [164] be promoted is nonetheless, a violation of the statutes. If the necessary effect is or may be to injure or defraud the bank, it is, I believe it is not necessary to show then that any actual injury to the bank occured, and even further the cases say that the bank could make money out of the scheme or out of violations charged under section 656 but the violation has still occured if the other necessary elements are present. A person's intent to repay a bank to make restitution or to benefit a bank is not a defense to the crime charged nor is it material to the offense. On the other hand now, we spoke also about this exhibit earlier about the offense charged by the Government under 1014 for check kiting. The crucial question in that statute is whether the defendant intended to write checks which he could not reasonably expect to be covered when he wrote them and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making withdrawals against them.

* * *

WITNESS: WILLIAM ARCHIE WILLIAMS

Direct Examination

* * *

[180] 55 Q. I noticed that on May 10th of 1978 the Government's exhibit G-1, you wrote a check for $60,000. At that time was it your belief that this money was to your credit with that bank? A. That's correct. It should have been to my credit.

56 Q. By that bank, I mean the Pelican Bank. A. The Pelican Bank. In other words, I should have had more money than anything you're talking about.

57 Q. You carried this check to the Pelican Bank? A. That's correct. I carried— I had a bank money order. As you see the check was made to me before and I got a bank money order.

58 Q. Who did you give it to? A. I carried— I gave it to Ollie Stone, which had handled all the business of the bank. The bank examiner was standing there.

59 Q. All right, at the time you wrote the check you believed this to be to your account and therefore this check was fully funded? A. That's correct.

* * *

[193] 426 Q. I'm looking at your check on the Winn State Bank that cashed on May 9, 1978, in the amount of $58,500. Would you start with that check and show the jury and the court exactly what your actions, with regard to that check and these other checks were from that point forward. A. This is on (Indicating) May, I don't know exactly what date, we had the bank examiners in the bank on, I believe, May 9th. I believe that's the date that they say. This check was written on May, I believe it's the 8th, I'm not sure. (CONFERENCE) What the situation was Taylor Motor Company owed the Pelican Bank money. We were in the process of getting into sale their assets in Taylor Motor Company to pay off the Pelican Bank and to pay, where the bank could pay what they owed me too. I left the bank knowing, see this had been going on long before the examiners come. [194] This way going on, to make—

427 Q. What was going on? A. To make the sale to reimburse—

428 Q. Let me get clear about the sale of whom to whom. A. The sale of Taylor Motor Company to Mr. Sanford. They had entered into a couple of agreements, one for three months, and another one they extended for another thirty days. This had been going on.

All the paperwork had been completed, which you don't have it here. The paperwork was done. I knew when I gave that check, I told him, I said the examiners are fixing to go and finish the deal and get through with it, which they knew. We had talked about it. When I gave him that check—

429 Q. Gave who? A. Gave it to Sonny Stone. He knew that I was going to bring, I knew that I was going to bring back this money.

430 Q. How much? A. $60,000 that belongs to me. The same day—

[195] 431 Q. That's exhibit D? A. That's exhibit D, right, dated the same day.

432 Q. D-2? A. D-2. When I left out he had the check in his hand. I went to Winnfield and met Mr. Sanford and his attorney. We got into doing all of these agreements, which was done that day. There are four, I believe. I guaranteed a lot of stuff for the bank.

433 Q. A lot of stuff, like what? A. Let me just tell you. I guaranteed, they owed $250,000, had a note for $250,000 that they owed the bank. In order to make that sale, I had to guarantee that if the Taylor Motor Company did not pay that $250,000 I had to pay it. I personally guaranteed it.

434 Q. Who did you guarantee that to? A. I guaranteed that to Sanford Motor Company, and put it in writing. He said you're worth it and I expect you to pay it if Taylor Motor Company don't pay it. I signed an agreement saying, in order to take care of the bank and that, I guaranteed that $250,000. We went [196] through that. Mr. Sanford put up the $100,000—

435 Q. Is that represented by D-4? A. That's D-4. He put up the $100,000 and he, we called the bank and got the amount of money that I was owed by the Pelican Bank and it's written on one of the agreements. So the

$100,000 was deposited in my account and Mr. Sanford's account where we could write checks to pay whoever need to be paid this money.

436 Q. What was the name of that account? A. The name of the account was T & W Account, W. A. Williams and Tom Sanford. Then we wrote a check out of this account for $60,000 and it's written out to W. A. Williams as the agreement said, W. A. Williams is owned $77,000. In the agreement it said he will receive part of the money owed to him. We only had $60,000 left above the money that was owed for personal debts by Taylor Motor Company under the bulk sale law. Mr. Womack insisted that we take this check and make it [197] to W. A. Williams and Pelican Bank for the $60,000 and get a bank money order and that's what I did. We got a bank money order under his guidance. I took the $60,000 bank money order plus all these things that I had guaranteed in the agreement and carried them back to the bank.

437 Q. This is still May 9th? A. This is May 9th. See the examiners stayed to 5:00. You couldn't have completed this in one day, but it had already been worked up. It took most of the day. I got there before the bank had closed, in other words when I say closed, before the examiners left, before 5:00. I gave the bank money order plus the agreements, a copy of the agreements, to Mr. Stone, and a copy to the examiners; one of the examiners that was there.

438 Q. Did you— When you gave Mr. Stone this check up here, did you make out this deposit slip? A. No, I didn't.

439 Q. You just handed him a fair check? A. That's correct, bank money order, without a [198] deposit slip. I didn't know that that check had been deposited until when I got back. That check, so see I give them

a bank money order. That check had been deposited instead of them waiting until I brough the bank money order, which would have been the thing that they ordinarily would have to have a bank order to negotiate. But they negotiated that check.

THE COURT: Just a minute, Mr. Cady. Pour some water. Pour some water in this thing, please, and pass it up here. Excuse me, Mr. Cady.

MR. CADY: Yes, sir.

THE COURT: Mr. Williams, what did you, you said you gave the bank money order and some other papers to Mr. Stone?

WITNESS WILLIAMS: Correct.

THE COURT: And you gave copies to the bank examiners?

WITNESS WILLIAMS: I gave them a copy, in other words, we had I did it in triplicate originals and I gave them one of the originals. [199] They have it cause it went to the, whoever people they report to. It had all the guarantees as to what I was having to do to complete this deal and it had my $60,000 in a bank money order, which I tended to them.

THE COURT: But whatever you gave Mr. Stone, you gave copies to the bank examiners?

WITNESS WILLIAMS: I certainly did, yes, sir. It was an original, a triplicate, I think they call it triplicate original. Go ahead?

THE COURT: No, Mr. Cady has got to ask a questions.

440 Q. First, let me ask you was this, you can see by looking that this check was not credited to your account as you anticipated. Where was it credited? A. It went into the dummy, to pay— They paid off some cars with my check.

441 Q. Instead of giving you. Did you instruct them to do that? A. No. I brought my money to give to him which would have been in place of that check.

* * *

[202] 455 Q. Did you testify as to what happened, how this check was applied rather than being placed in [203] your account? A. Well, that was found out at a later date. This $60,000 was supposed to have went into my benefit, I guess you would put it, what bought or paid some other obligations of the bank. It went into a cash, they paid off cars in a cash item in the dummy. Additional cars.

456 Q. They did not give you a credit? A. They didn't give me credit.

457 Q. Without your instructions? A. Without my instructions, you better believe it. This other check— The only— When I found this out later is when I borrowed this $65,000. There would have been no point in borrowing this $65,000 if they had applied this money here. When they told me they needed additional money I had property, additional property free and clear. As soon as they told me I went to the Sabine State Bank and they told me they would loan me the money on the property.

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JURY INSTRUCTIONS

* * *

[319] In Counts II and III, the Government alleges that defendant violated Section 1014 of Title 18 which provides, in part:

> Whoever knowingly makes any false statement or report, or willfully over-values any . . . property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are

insured by The Federal Deposit Insurance Corporation . . . upon any application, advance . . . commitment, or loan, or any . . . extension of . . . the same (shall be guilty of an offense against the United States.)

Remember a separate crime of offense is charged in Counts II and III. You should consider the evidence pertaining to each count separately. The offense charged in each count is completed only after each of the essential elements you are about to hear is proven beyond a reasonable doubt. If the Government fails to prove any element of [320] the offense charged in that count then the defendant must be acquitted as to that count.

A check is a security for purposes of Section 1014. The Government charges that Mr. Williams was involved in check-kiting—a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks. This is not simply writing checks on a personal account, which may be temporarily overdrawn. Check-kiting involves more than the mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts, which, taken together, constitute a scheme built upon a series of false representations designed to give the defendant time and credit.

In check-kiting, a bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. This credit is normally used immediately. The check-kiter then deposits a second check in the bank upon which the original check is drawn. The second check is [321] drawn on a different bank and is deposited in the first bank before the original check arrives. Credit for this second check is taken, which covers the first check. The process is carried on, back and forth, until the scheme is discovered.

The essential elements that the Government must prove beyond a reasonable doubt to establish the offense charged in Count II of the indictment are:

FIRST: That on or about May 9, 1978, the defendant, William Archie Williams, did knowingly and willfully make a false statement of a material fact to the Pelican State Bank, that is, that he represented that a check, dated May 9, 1978, drawn on the account of Mr. Williams at the Winn State Bank and Trust Company, Account No. 122-344-5-01, in the amount of $58,500 had sufficient funds to cover the amount of said check.

SECOND: That this false statement [322] concerned a material fact, that is, a fact which would influence the decision of the officers or employees of the Pelican State Bank;

THIRD: That the defendant made the false statement with fraudulent intent to influence the Pelican State Bank to extend credit to the defendant.

The essential elements that the Government must prove beyond a reasonable doubt to establish the offense charged in Count III of the indictment are:

FIRST: That on or about May 10, 1978, the defendant, William Archie Williams, did knowingly and willfully make a false statement of a material fact to the Winn State Bank and Trust Company, that is, that he represented that a check, dated May 10, 1978, drawn on the account of William Archie Williams at the Pelican State Bank in the amount of $60,000 had [323] sufficient funds to cover the amount of said check;

SECOND: That this false statement concerned a material fact, that is, a fact which would influence the decision of the officers or employees of the Winn State Bank;

THIRD: That the defendant made the false statement with fraudulent intent to influence the Winn State Bank and Trust Company to extend credit to the defendant.

A statement is "false" if it relates to a material fact and is untrue and is then know to be untrue by the person making it.

A fact is "material" if it is relevant to the decision to be made by the officers or employees of the institution and has the capacity of influencing them in making their decision.

It is not necessary, however, to prove that the institution involved was, in fact, influenced [324] or misled. The gist of the offense is an attempt to influence such an institution by willfully making a false statement or report concerning a material fact.

The crucial question in check-kiting is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them. Hence, proof that the checks were eventually paid might well be pertinent to defendant's initial intent, that is, whether he intended to deceive the bank.

* * *

MINUTE BOOK

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MONDAY JANUARY 14, 1980

Court met before Judge Tom Stagg pursuant to adjournment at 9:00 a.m.

PRESENT: HON. TOM STAGG, JUDGE, PRESIDING, Bill Hogan, Court Reporter, Bob Terry, Jr., Minute Clerk

* * *

NO. CR-79-50016-01 CRIMINAL

UNITED STATES OF AMERICA

vs.

WILLIAM ARCHIE WILLIAMS

APPEARANCES:

Brian P. Joffrion for Government

William Cady, III for Defendant

Defendant present, represented by counsel aforesaid for sentencing. The Court ruled that on count three it is ordered that defendant be committed to the custody of the Attorney General for a period of six months. On counts one and two, it is ordered that imposition of sentence be suspended and defendant be placed on supervised probation for a period of five years to begin at the completion of his confinement sentence. It is the recommendation of the Court that defendant be committed to the Federal

Prison Camp, Maxwell Air Force Base, Montgomery, Alabama for service of the six months comfinement sentence.

Defendant is to be put on a $2,500.00 OR bond pending his notice of appeal. Two letters filed: (1) Letter dated 1-13-80 from Judge John S. Pickett; (2) Letter dated 9-26-79 from Arnold Kilpatrick. (TS)

At 5:50 p.m., it was ordered that Court before Judge Tom Stagg be adjourned. (TS)

SUPREME COURT OF THE UNITED STATES

No. 80-2116

William Archie Williams,
Petitioner,

v.

United States

The order entered November 9, 1981, is amended to read as follows:

The petition for a writ of certiorari is granted limited to Questions 3 and 4 presented by the petition.

December 7, 1981

(Seal of the Supreme Court of the United States)

A true copy ALEXANDER L. STEVAS

Test:

Clerk of the Supreme Court of the United States

By /s/ (Illegible)
Chief Deputy

CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Joint Appendix by mailing three copies thereof in envelopes properly stamped and addressed as follows:

Rex E. Lee, Esquire
Solicitor General
Richard Wilkens, Esquire
Assistant to the Solicitor General
Department of Justice—Suite 5143
9th & Constitution Avenue, N.W.
Washington, D.C. 20530

This 19th day of February, 1982.

NICKOLAS P. CHILIVIS

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2116

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's "check kiting" scheme came within the reach of 18 U.S.C. 1014.

2. Whether the district court abused its discretion in excluding a series of exhibits and accompanying testimony proffered by petitioner.

3. Whether the district court erroneously instructed the jury on weighing petitioner's testimony.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 639 F.2d 1311.

JURISDICTION

The judgment of the court of appeals (Pet. App. A22) was entered on March 19, 1981. A petition for rehearing was denied on April 17, 1981 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on June 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or

otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on one count of misapplying bank funds, in violation of 18 U.S.C. 656 (Count I), and two counts of "check kiting," in violation of 18 U.S.C. 1014 (Counts II and III). He was sentenced to six months' imprisonment on Count III and five years' probation on Counts I and II. The court of appeals affirmed (Pet. App. A1-A21).

The evidence at trial is recounted in the opinion of the court of appeals (Pet. App. A3-A7). It showed that in 1975 petitioner purchased the majority interest in the Pelican State Bank in Pelican, Louisiana, and promptly appointed himself bank president (*id.* at A3). For several years prior to petitioner's assumption of control of Pelican Bank, the bank had maintained a so-called "dummy account," which was used to pay checks drawn on the bank by customers who had insufficient funds in their individual checking accounts to cover their obligations. A check would be paid from the bank's general assets and held in the dummy account until the customer had deposited sufficient funds to cover the check. At this point, the check would be posted to the customer's account and the figure for accumulated checks in the dummy account would be correspondingly reduced. The bank charged no interest for providing this service. *Id.* at A4.

As controlling shareholder and bank president, petitioner enjoyed unhindered personal use of the

dummy account. By May 2, 1978, total overdrafts attributable to him amounted to $58,055.44, more than 50% of the total overdrafts then covered by the dummy account. On May 9, 1978, petitioner deposited in his personal checking account at Pelican Bank a check for $58,500 drawn upon his checking account at Winn State Bank, Winnfield, Louisiana. This sum far exceeded his actual balance in Winn Bank. Pelican Bank thereupon credited petitioner's checking account for the face amount of the deposited check, at the same time posting to his account the group of checks that he had drawn prior to May 2 and that had been cleared through the dummy account. Pet. App. A4-A5.

On May 10, 1978, petitioner deposited in his checking account at Winn Bank a check for $60,000 drawn on his personal checking account at Pelican Bank. The sum far exceeded his balance in the drawee bank. Winn Bank credited his account for the face amount of the check, and subsequently routinely paid the $58,500 check given to Pelican Bank on May 9, when it cleared for payment on May 12, 1978. Pet. App. A6.

On May 11, 1978, the $60,000 check that petitioner had deposited in Winn Bank the day before was presented for payment at Pelican Bank. Because petitioner had insufficient funds to cover the check in his Pelican account, Pelican cleared the check through the dummy account. Pet. App. A6.

On May 16, 1978, petitioner deposited in his checking account at Pelican Bank a check for $65,000 drawn upon his combined personal and business checking account at Sabine State Bank, Many, Louisiana. His actual balance, once more, was far less than this sum. Pelican Bank credited his checking account for the face amount of the check and, at the same

time, posted to his checking account the $60,000 check that he had deposited in Winn Bank on May 10 and that had been cleared through the dummy account on May 11. Pet. App. A6.

Because of insufficient funds in petitioner's account, Sabine Bank refused to make payment on the $65,000 check. Pelican Bank subsequently charged petitioner's account accordingly. Petitioner neutralized the charge-back by depositing a $65,000 money order in his Pelican account the same day. Pet. App. A6-A7.

As a result of the above activity, petitioner was able to obtain for his personal account at Pelican Bank interest-free credit of $58,000 from May 9, 1978 to May 12, 1978, and of $65,000 from May 16, 1978 to May 23, 1978. In addition, he was able to obtain interest-free credit of $60,000 at Winn Bank from May 10, 1978 to May 11, 1978. Pet. App. A7.

ARGUMENT

1. Petitioner contends (Pet. 23-26) that his "check kiting" scheme did not come within the reach of 18 U.S.C. 1014. First, he argues (Pet. 23-25) that a check is not a "security" within the meaning of the statute. He further argues (Pet. 25-26) that even if a check is a security, it is not "overvalued" within the meaning of the statute so long as it represents an "enforceable obligation." The court of appeals correctly rejected these claims.

As petitioner recognizes (Pet. 23), a check was held to be a "security" in *United States* v. *Payne*, 602 F.2d 1215, 1218 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980). Petitioner argues that this construction is nonetheless contrary to Section 1014's legislative history, which, in his view, suggests an

intent to limit the statute's application to frauds arising from the pledging of collateral for an extension of credit. He correctly notes that the statute, as originally enacted, was a compilation of 13 earlier laws primarily concerning misrepresentation to government agencies responsible for making farm and home loans, transactions usually involving collateral. See Act of June 25, 1948, ch. 645, 62 Stat. 752. But in 1970 Congress expanded the scope of Section 1014 to include false applications to banks and similar institutions insured by either the FDIC or the FSLIC. As the court of appeals in *Payne* concluded, quoting *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978), "[t]he statute therefore proscribes * * * '*all undertaking*[*s*] which might subject the FDIC insured bank to risk of loss' " (602 F.2d at 1219; emphasis added).[1]

Furthermore, petitioner's checks were "overvalued" under Section 1014. Although it is true that a check is an enforceable obligation, in giving a check " 'the drawer impliedly represents that he has on deposit with the drawee banks funds equivalent to the face amount of the check.' " *United States* v. *Payne*, *supra*, 602 F.2d at 1218, quoting F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965). Here, petitioner contrived to obtain credit by falsely representing that his checks were worth their face value. As the court of appeals correctly concluded (Pet. App. A19-A20), 18 U.S.C. 1014 makes such conduct a federal crime.

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[1] We note that in 18 U.S.C. 2311, relating to stolen property, a "security" is specifically defined to include "any * * * check * * *."

In the absence of a conflict among the circuits on the proper construction of Section 1014, review of the issue by this Court is unwarranted.[2]

2. Petitioner contends (Pet. 14-23) that the district court improperly excluded certain exhibits and accompanying testimony relevant to the issue of his intent to defraud Pelican Bank under 18 U.S.C. 656.

At trial, petitioner attempted to negate the intent element of Section 656 by showing that at all pertinent times he maintained credits at the bank that exceeded his drawings upon the dummy account. Petitioner's theory, as outlined by his counsel in an initial proffer to the trial court (Tr. 147-150, 153-154, 158-160),[3] was that Pelican Bank had decided in November 1977 to terminate its commitment to finance the purchase of General Motors cars and trucks by Taylor Motor Company, and that petitioner had personally made payments totalling some $79,000 to General Motors for previously ordered cars delivered to Taylor, thereby aiding the bank, as guarantor, with money that otherwise could have covered his under-funded checks in May. The payments were allegedly evidenced by money orders purchased with cash and corresponding promissory notes signed by Taylor Motor Company and made payable to Pelican Bank. Petitioner's counsel did not represent that petitioner's name was on any of the notes or money orders; he stated (Tr. 160) that evidence of peti-

[2] Two district court decisions have adopted petitioner's reading of Section 1014. *United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978); *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa. 1981), appeal docketed, No. 81-1317 (3d Cir. Feb. 27, 1981).

[3] "Tr." refers to the transcript of the trial.

tioner's role could be established "possibly" by testimony from Jessie Bridges, who was associated with Tayor Motor Company, and Ollie Stone, a vice-president of Pelican Bank, and by petitioner's own testimony.

The trial court, applying Fed. R. Evid. 403, found (Tr. 152, 165) that the probative value of this evidence on intent to injure the bank was outweighed by its tendency to mislead and confuse the jury,[4] but it permitted counsel to have the testimony recorded by the court reporter, "after the jury has retired at the end of this trial," to be used for "whatever purpose you make of it" (Tr. 167).

Despite the trial court's rejection of the proffer, petitioner in fact put on a defense regarding the alleged payment of bank-guaranteed obligations on behalf of Taylor Motor Company. He testified (Pet. App. A11) that prior to the events in question, Pelican Bank had entered into an agreement with General Motors to finance the purchase of new cars by Taylor Motor Company, a local car dealership. He further testified (Pet. App. A11-A12) that when Pelican subsequently terminated the financing relationship in November 1977, he undertook to advance Pelican whatever funds would be necessary to meet Pelican's obligation on cars still in transit or already delivered. According to petitioner, the bank's total indebtedness to him amounted to $77,000 by May 9, 1978, as a result of his undertaking (Pet. App. A12). He also testified that in May 1978, at the time of the sale of Taylor Motor Company, he had received $60,000 in payment of his prior advances for the company and,

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[4] The proffered evidence had no possible relevance to the two Section 1014 counts, as petitioner's counsel conceded during the trial (Pet. App. A15 n.6; Tr. 154, 155). Intent to defraud is not an element of an offense under Section 1014.

under the "guidance" of "Mr. Womack," the attorney who was handling the sale for the company, purchased a $60,000 money order made out to him and to Pelican Bank, which he thereafter delivered to Ollie Stone, Pelican Bank's vice-president (Tr. 177, 196-200). He testified (Tr. 198-200, 201) that he thought the money should have been credited to his account but that it was, instead, used to "pa[y] off some cars" for the company.

Stephen Roberts, a certified public accountant who appeared as a witness for petitioner, testified (Tr. 252-256) that he had examined certain documents showing cash purchases of money orders by an unknown source on four separate occasions between December 19, 1977, and March 15, 1978, used to pay obligations to General Motors for automobiles sent to Taylor Motor Company; they totalled some $56,000. He linked one payment to petitioner on the basis of a handwritten notation on a ledger card supplied to him by petitioner's counsel (Tr. 254-255, 257-258). He also testified (Tr. 256) that he had examined promissory notes made out to the bank and signed by Taylor Motor Company corresponding to those payments.

Ollie Stone, the Pelican Bank vice-president, testified in rebuttal for the government, and petitioner declined the opportunity to cross-examine him (Tr. 287), even though this would have presented an opportunity to challenge Stone's testimony (Tr. 285) that the Pelican Bank at no time owed petitioner any money. Jessie Bridges, who was familiar with the sale of Taylor Motor Company, testified for the government that at no time had the company owed petitioner any money (Tr. 299-300).

Petitioner's subsequently recorded proffer, presenting testimony by Ollie Stone and accountant Roberts, is, as the court of appeals correctly concluded (Pet.

App. A14), in large part "needlessly cumulative." [5] The proffered evidence did not reveal the answer to the critical question—the identity of the source of the individual cash injections to which the accountant had testified at trial (see Supp. Tr. 24) (admission by accountant that he did not know source of the funds).[6]

In sum, the trial court correctly concluded, on the basis of counsel's representations, that the tendency of extensive evidence of transactions involving the Taylor Motor Company to confuse the jury out-

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[5] The excluded exhibits previously offered by petitioner in support of his argument that his credits at Pelican Bank at all relevant times exceeded his withdrawals from the dummy account consisted of: (1) a letter from Pelican Bank to General Motors informing the latter that Pelican Bank no longer intended to finance the purchase of new cars by Taylor Motors; (2) several promissory notes from Taylor Motors to Pelican Bank; (3) a number of bank money orders, dating from December 1977 to March 1978, evidencing total payments during this period of $56,393.87 from Taylor's account at Pelican Bank to General Motors, and (4) miscellaneous documentation relating to Taylor's new car purchases in November and December of 1977 and their financing by Pelican Bank (Pet. App. A13-A14).

[6] "Supp. Tr." refers to the transcript of the recorded proffer. Because petitioner's counsel did not explain to the trial court, *before* the ruling on the proffer, exactly what he expected Ollie Stone to say in his testimony, and because he failed to use the opportunity to cross-examine Stone at trial on his testimony that petitioner was not a creditor of the Pelican Bank, Stone's vague reference (Supp. Tr. 8) to petitioner's possible payment of a single money order for the benefit of Taylor Motor Company does not bear the weight petitioner ascribes to it (Pet. 20).

Petitioner offered no testimony from Womack, the attorney who, according to his trial testimony, had overseen the payment to him of $60,000 from the proceeds of the sale of Taylor Motor Company (see page 9, *supra*).

weighed the probative value of the evidence on the question of petitioner's intent to defraud the bank through the check kiting scheme by which he received interest-free extensions of credit. Permitting petitioner to explore, at much greater length than he did, the details of the documents relating to the promissory notes, money orders, and correspondence between the bank and General Motors, would have, as the court of appeals observed (Pet. App. A14), "cluttered [the record] with numerous details of business transactions only tangentially related to the question of [petitioner's] overdrafts." [7]

3. In its final charge to the jury, the district court gave the following instruction (Tr. 313):

> You have heard the testimony of William Archie Williams. In weighing his testimony, you can consider his keen personal interest in the outcome of the trial. If you feel that this interest is sufficient to affect the defendant's credibility then—[o]f course—[y]ou are free to reject his testimony. But, remember, you may not reject his testimony merely because William Archie Williams is the defendant in this matter.

Relying primarily on *Reagan* v. *United States*, 157 U.S. 301 (1895), petitioner contends (Pet. 7-14) that this instruction was reversible error.

In *Reagan*, this Court upheld an instruction that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered

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[7] Because petitioner in fact introduced evidence (the testimony of accountant Roberts) corroborating his own testimony and had the opportunity to seek to adduce corroborating evidence from Ollie Stone on cross-examination, this case is distinguishable from *Miller* v. *Poretsky*, 595 F.2d 780 (D.C. Cir. 1978), on which petitioner heavily relies (Pet. 16, 18, 23).

t the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." 157 U.S. at 304. See also, upholding similar instructions, *United States* v. *Hernandez*, 588 F.2d 346, 349-350 (2d Cir. 1978); *United States* v. *Hill*, 470 F.2d 361, 363-364 (D.C. Cir. 1972). Petitioner argues that the decision below conflicts with *Reagan*, first, because the jury here was effectively instructed to "disregard the defendant's testimony" (Pet. 9). But this was simply not the case. Rather, the jury was told that it "*can*" consider petitioner's interest in the outcome of the case, and that it was "*free* to reject his testimony" if it "fe[lt]" that his interest affected his credibility (Tr. 313; emphasis added). Indeed, at the conclusion of the instruction, the court reminded the jury that it should not reject petitioner's testimony merely because he was the defendant in the case.

Petitioner further argues that the decision in this case conflicts with *Reagan* because the jury here was not instructed that petitioner's interest in the outcome was only " 'a circumstance to be considered in weighing his testimony * * *' " (Pet. 9, quoting *Reagan*, *supra*, 157 U.S. at 306). Reading the instruction as a whole, however (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the jury was so instructed. Just before giving the challenged instruction, the district court informed the jury (Tr. 312) of the various factors involved in weighing the credibility of a witness, including his relationship to a party, his interest in the case, his demeanor, his knowledge of the facts about which he testified, his candor and intelligence, and the extent to which his testimony was corroborated or contradicted by other evidence. While the challenged instruction may have emphasized the

factor of the defendant's interest in the outcome, it did not exclude the other factors from the jury's consideration. Accordingly, the district court here did precisely what this Court found unobjectionable in *Reagan*: "[i]n the first part [of its credibility instruction] it la[id] down a general rule, applicable to all circumstances, and then in the latter part [it] simply call[ed] attention to the fact that the defendant ha[d] a deep personal interest in the result of the suit, and that that should be considered by the jury." 157 U.S. at 311.[8]

As petitioner points out (Pet. 10-11), some courts of appeals have expressly criticized "credibility" instructions that single out for comment the defendant's interest in the case. See, *e.g.*, *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); *Carrigan* v. *United States*, 405 F.2d 1197, 1198 (1st Cir. 1969), cert. denied, 396 U.S. 1028 (1970); *Taylor* v. *United States*, 390 F.2d 278, 285 (8th Cir.), cert denied, 393 U.S. 869 (1968). However, none of these courts has seen fit to reverse a conviction solely on the basis of the giving of such an instruction.[9]

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[8] Petitioner also argues (Pet. 13) that the instruction was defective because it permitted the jury to reject his testimony completely even "if his credibility was affected minutely [by his interest in the outcome] * * *." This constitutes an unduly technical and highly unrealistic reading of the instruction, particularly in light of the court's statement to the jury that it could "accept or reject the testimony of any witness in whole or in part" (Tr. 312).

[9] In *United States* v. *Reid*, 410 F.2d 1223, 1227-1228 (7th Cir. 1969), the court held that it was reversible error to instruct the jury on the defendant's interest in the case while refusing an explicit request to instruct it that government witnesses are not entitled to any special credibility by the fact of their office alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

AUGUST 1981

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UNITED STATES OF AMERICA

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

REX E. LEE
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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We wish to call the Court's attention to the recent decision in *United States* v. *Sher*, No. 81-1317 (3d Cir. Aug. 14, 1981), which appears to conflict with the position taken by the Fifth Circuit in this case.[1] See Brief for the United States in Opposition at 6-7. The Solicitor General has authorized the filing of a petition for rehearing en banc to review the panel opinion in *Sher*.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[1]The court of appeals relied upon the opinion of the district court, which is reported at 505 F. Supp. 858 (W.D. Pa. 1981).

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No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress in passing 18 U.S.C. § 1014 intended to proscribe the deposit of bad checks or "check kiting".

2. Whether a non-collected check upon which a bank extends credit and which is an enforceable obligation can be alleged in an indictment to be a "false statement" under 18 U.S.C. § 1014 on the theory that it is "overvalued".

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No. 80-2116

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WILLIAM ARCHIE WILLIAMS,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at *United States v. Williams,* 80-3064, 639 F.2d 1311 (5th Cir. 1981). This opinion appears in Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed in this Court on June 13, 1981.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1981. A timely Petition For Rehearing and Suggestion for Rehearing *En Banc* were denied on April 17, 1981. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed on June 13, 1981, and the petition

was granted on November 9, 1981. The Court amended its grant of the petition on December 7, 1981 to limit it to questions 3 and 4 presented by the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 1014 (1970).

"Whoever makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134-m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve Bank, a small business investment company, a Federal Credit Union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Ad-

ministrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, the deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

STATEMENT OF THE CASE

On October 19, 1979, a three-count superseding indictment was returned against William Archie Williams (hereinafter "Williams"), the petitioner in this matter. Count I of the indictment alleged that Williams had, with intent to injure and defraud, misapplied funds of the Pelican State Bank (hereinafter referred to as "PSB"), in the amount of $58,055.44, in violation of 18 U.S.C. § 656. Counts II and III of the indictment alleged similarly that Williams had willfully overvalued "a security" in violation of 18 U.S.C. § 1014 by depositing a personal check drawn on his account at Winn State Bank in his account at PSB (Count II), and a personal check drawn on his account at Pelican State Bank in his account at Winn State Bank (Count III), then knowing that there were insufficient funds in the accounts at the respective drawee banks to cover the checks. J.A. 2-4.[1]

On December 12, 1979, Williams was convicted on all three counts of the indictment. Williams was given probation on Counts I and II, and was sentenced to serve six months in prison on Count III. J.A. 39-40. Williams appealed his conviction to the United States Court of Ap-

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1. "J.A." refers to the Joint Appendix to the Brief for Petitioner.

peals for the Fifth Circuit (No. 80-3064), and on March 19, 1981, Judge Kunzig, Judge of the United States Court of Claims, sitting by designation, wrote the opinion which is the subject of this petition affirming the conviction of Williams on all three counts. 639 F.2d 1311; A1-22.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

This Court granted the petition for writ of certiorari on November 9, 1981. On December 7, 1981 this Court limited the grant to questions 3 and 4 as presented by the petition. J.A. 40. These questions relate directly to the sufficiency of alleged violations of 18 U.S.C. § 1014. See Counts II and III of the indictment.[3]

On appeal to the Fifth Circuit Williams contended, in part, that the conviction on Counts II and III be reversed on the following grounds (1) that Counts II and III failed to state an offense within the reach of 18 U.S.C. § 1014; (2) that a non-collected check is not "security" within the meaning of 18 U.S.C. § 1014; (3) that, as a matter of law, a check is not "a security"; (4) that § 1014 does not cover "check kiting"; and (5) that such a check cannot be false under 18 U.S.C. § 1014 on the theory that it is "overvalued". See Reply Brief of Appellant, *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981). Relying primarily on *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), the Fifth Circuit rejected these claims. 639 F.2d at 1319-1320; A19-20. *Contra*, see *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No.

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2. "A" refers to the Appendix to the printed Petition for Certiorari.

3. If this Court dismisses Counts II and III, we vigorously contend that the evidence introduced at trial on Counts II and III so infected and permeated this matter so as to require a new trial as to Count I. See e.g. J.A. 20-21, 23-27, 35-38. The numerous references to "check kiting" made it impossible for the petitioner to receive a fair trial on Count I.

81-1317 (3rd Cir. August 14, 1981), *petition for cert. filed*, No. 81-1047 (3rd Cir. Dec. 4, 1981); *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980).

Counts II and III allege essentially that the mere presentment of a check for deposit at a collecting bank, without more, violates § 1014 if at the time of the presentment for deposit there were insufficient funds at the drawee bank. "Check kiting" was not alleged by Counts II and III of the indictment.

No evidence was presented at trial suggesting or even intimating that the petitioner made any oral or written statement or representation at the time when the checks at issue were presented for deposit at the collecting banks named in Counts II and III. See, e.g. J.A. 7-10, 12-17, 28; Tr. p. 36.[4] As significantly, it was not alleged nor was any evidence presented at trial that the petitioner requested immediate credit on the checks which were presented for deposit at the bank named in Counts II and III. *Id.* See also Counts II and III. J.A. 2-4. Moreover, it was not alleged nor was any evidence presented at trial that the petitioner requested a loan or credit from the collecting banks named in Counts II and III or that the checks presented were to be held by the bank as security. *Id.*

However, the government contended at trial with respect to the alleged violations of Counts II and III that the petitioner was involved in a "check kiting scheme" and that the mere presentment of a check for deposit at a collecting bank constituted an overvalued security within the reach of 18 U.S.C. § 1014 if *at the time of presentment for deposit* the drawee bank had insufficient funds to cover that check. J.A. 21-30. Government counsel throughout

4. "Tr." refers to the trial transcript.

the trial questioned witnesses with respect to whether the evidence adduced constituted "check kiting" and repeatedly led the jury to believe that Counts II and III as alleged constituted a criminal offense by focusing upon whether the petitioner had sufficient funds at the drawer bank to cover the checks at the time he wrote the checks. *Id.*

The Court charged the jury that a check is "a security" for purposes of § 1014 and further instructed the jury that the government had charged the petitioner with "check kiting." J.A. 35-37. The trial court charged in part as follows:

> "A check is a security for purposes of § 1014. The government charges that Mr. Williams was involved in check kiting—a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks. This is not simply writing checks on a personal account, which may be temporarily overdrawn. Check kiting involves more than the mere use of a check with insufficient funds in the bank to meet it. It involved a series of acts, which, taken together, constitute a scheme built upon a series of false representations designed to give the defendant time and credit.
>
> In check kiting, a bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. This credit is normally used immediately. The check kiter then deposits a second check in the bank upon which the original check is drawn. The second check is drawn on a different bank and is deposited in the first bank before the original check arrives. Credit for the second check is taken, which covers the first check. The process is carried on, back and forth, until the scheme is discovered." J.A. 36-37.

The record in this case shows that the petitioner made a conditional delivery of a $58,500 check drawn on the Winn State Bank to Ollie Stone, cashier at the Pelican State Bank, telling him to hold the check until the sale of Taylor Motor Co. (TMC) was consummated. J.A. 12, 31-32; Tr. p. 36. The petitioner expected to receive proceeds that day from the sale due to his having advanced personal funds to GM, on behalf of the bank, in payment for cars shipped to TMC. J.A. 31-34.

After the sale was consummated, and on the same day, the petitioner brought back a $60,000 money order to exchange for the check. J.A. 31-34. He learned that Ollie Stone had not held the check, but had deposited it to his PSB account. J.A. 33-34. Petitioner told Stone to credit the $60,000 money order to his PSB account. J.A. 31-35. Petitioner then drew a check for $60,000 on his PSB account and deposited it at the Winn State Bank. J.A. 14, 30-35.

Stone, however, did not deposit the $60,000 to petitioner's account but, upon directions of the state bank examiner, applied it to cash items of TMC. Thus when the Winn State Bank sent the $60,000 check to PSB for collection, there were insufficient funds to cover it. J.A. 35. It was not dishonored, however, but was held and the petitioner was notified of the shortfall.

Williams immediately went to the Sabine State Bank and completed negotiations on a $65,000 loan. J.A. 35. He gave PSB a check for $65,000 drawn on Sabine State Bank to cover the $60,000 item. But the $65,000 check was presented to the Sabine State Bank for payment one day before the loan proceeds were credited to his account. As a result the check was dishonored and PSB charged back petitioner's account. J.A. 16-17. After receiving notice of this dishonor, petitioner honored the obligation by giving

PSB a money order for the full amount. J.A. 16-17, 21, 35; Tr. pp. 35-36. The petitioner honored the check after receiving notice of dishonor consistent with his contractual representation under La. Rev. Stat. Ann. § 10:3-413(2) (1975).

SUMMARY OF ARGUMENT

A. 1. 18 U.S.C. § 1014 (1970), as written, makes no reference to the cashing or depositing of checks, nor does it purport by its terms to prohibit "check kiting". As worded when originally enacted, § 1014 centered upon federal agencies which had responsibility primarily for making loans to farmers and homeowners. 18 U.S.C. § 1014 (1947), ch. 645, § 1014, 62 Stat. 952 (1948) (current version at 18 U.S.C. § 1014 (1970)). The 13 predecessor statutes to § 1014 also focused upon federal agencies or institutions which had responsibility for making loans to farmers and homeowners. None of the 13 predecessor statutes make mention of checks, their collection or check kiting.

Nothing in the legislative history of § 1014 evidences a Congressional concern with or intent to deal with the problem of "bad checks" or "check kiting" in relation to the institutions which are protected by § 1014. *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981). *Contra, United States v. Williams, supra; United States v. Payne, supra.* Therefore, a natural and reasonable reading of § 1014, with overall consideration of the statute and its legislative history, shows that this statute extends only to commercial or personal loan or credit transactions, not to bad checks and "check kiting". This conclusion is more

compelling in light of the well-established maxim of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971).

2. By enacting 18 U.S.C. § 1014, Congress did not intend to expand the scope of federal jurisdiction to the problem of bad checks or to check kiting since by the original date of enactment of § 1014, virtually all American state jurisdictions had enacted statutes which specifically criminalized the drawer's passing of a check drawn upon an account having insufficient funds to satisfy the check. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973); Comment on Legislation, "Bad Check Laws", 44 Harv. L. Rev. 451, 453 & n. 13 (1931).

Congress itself evidenced its awareness of the "bad check" problem and its legislative remedies prior to the original enactment of § 1014 when it passed a provision for the District of Columbia which expressly governed bad checks. Ch. 273, 42 Stat. 820 (1922); D.C. Code Ann. § 22-1410 (1973). In light of the pervasive state legislation governing bad checks as well as Congress's own enactment for the District of Columbia of a bad check statute, it is clear that Congress did not intend when it passed § 1014 to make broad inroads into state jurisdiction. The judiciary should not assume that Congress intended a major expansion of federal criminal jurisdiction in enacting its criminal laws. *United States v. Enmons*, 410 U.S. 396 (1973). There is nothing in the legislative history of § 1014 which supports the conclusion that Congress intended to regulate the area of bad checks.

3. Counts II and III of the indictment similarly allege that the petitioner overvalued "a security, that is a check",

by the mere fact of presenting the check for deposit. The trial court charged the jury that a check is "a security." Section 1014, however, does not purport to prohibit the overvaluing of "a security". It prohibits, rather, the overvaluation of security in the sense of collateral. Counts II and III fail to allege that the check at issue in each count was "security" in the sense of collateral for a loan or credit transaction.

Examination of the 13 predecessor statutes clearly demonstrates that "security" is being used in the sense of collateral. See, e.g., 12 U.S.C. § 1123 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.) These statutes, for example, state in identical language:

> "Whoever willfully overvalues any property offered as security for any such advance shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

In concluding that a check is a "security", the Fifth Circuit in *Payne* placed significant reliance upon 18 U.S.C. § 2311 which contains a definitional provision defining "security" to include a check. This reliance is misplaced. Section 1014 is found in an entirely different chapter than § 2311 and does not contain a definitional provision. Again, when construing penal statutes, ambiguities are to be "resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973). The fact that a bank may, under certain circumstances, have a security interest in a check does not mean that the check is "a security."

4. When a bank extends credit on an uncollected check, the check is not collateral on an obligation but is the obligation itself; such an advance of funds is an unsecured extension of credit. Louisiana Revised Statutes specifically provide that a check does not operate as an

assignment of any funds. La. Rev. Stat. Ann. § 10:3-409(1) (1975). The check becomes an enforceable obligation and is not security on an obligation. A bank is not obligated to give immediate credit on a check. La. Rev. Stat. Ann. § 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is simply an unsecured extension of credit, evidenced by the check. Consequently, Counts II and III fail to state a cause of action.

5. The indictment in this case did not allege a "check kiting" scheme nor did it allege an intent to defraud the bank. Notwithstanding this, the District Court instructed the jury that the Government had charged check kiting. J.A. 36-37.

The Fifth Circuit in *Payne* went to great lengths to emphasize that a check kiting scheme was present as its apparent justification for an expansive reading of § 1014. 602 F.2d at 1217, 1218. However, the elements of § 1014 do not include the element of proof normally required with a check kiting scheme, that is, proof of intent to defraud. See 18 U.S.C. § 1341; *United States v. Gross*, 416 F.2d 1205, 1206 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). Section 1014, virtually a strict liability statute, is totally inappropriate to charge check kiting which normally requires proof of an intent to defraud.

B. The Government contends in this case that by presenting a check to a collecting bank for deposit, the petitioner necessarily was representing that at the time he had funds deposited in the drawee bank account in an amount equal to or greater than the amount shown on the check. J.A. 2-4. Without such funds, the government contends the check is "overvalued" and, therefore, "false" within the meaning of § 1014. However, under the Louisi-

ana Revised Statutes, a check is simply an order to pay a sum certain in money, signed by the drawer, payable on demand and payable to order or to bearer. The contract of the drawer is clearly set out by La. Rev. Stat. Ann. § 10:3-413(2):

> "The drawer engages that upon dishonor of the draft in any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any endorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

In effect the check is an unconditional promise to pay a sum certain. Thus the drawer does not represent by the mere act of presenting a check for deposit in a collecting bank that the check will not be dishonored; rather he only represents that if dishonored he will pay the check after any necessary notice of dishonor and protest.

In the case at bar, this is exactly what the petitioner did. After notice of dishonor he took the steps necessary to pay the check. J.A. 16-17, 21, 31-35; Tr. 35-36. Clearly, an uncollected check has value as an enforceable obligation to the face amount of the check. Therefore, the face amount of the check cannot constitute a false statement under § 1014 on the theory that it is "overvalued". *United States v. Edwards, supra* at pages 1356-57.

ARGUMENT

I. NEITHER THE LEGISLATIVE HISTORY NOR A FAIR AND NATURAL READING OF 18 U.S.C. § 1014 SUPPORTS THE CONCLUSION THAT CONGRESS INTENDED BY THE PASSAGE OF THIS STATUTE TO PROSCRIBE THE DEPOSIT OF CHECKS WITH INSUFFICIENT FUNDS OR TO PROSCRIBE CHECK KITING[5]

Counts II and III of the indictment allege that each of the two checks at issue is "a security", and further that each said check was false in that it was not of a value equal to the face amount of the check because at the time the check was presented for deposit at the collecting bank there were insufficient funds to cover the check then on deposit at the drawee bank. J.A. 2-4. However, the government also contended at the trial of this matter that the petitioner had engaged in a "check kiting scheme" in violation of 18 U.S.C. § 1014. The Court instructed the jury that the government charged Williams with "check kiting", notwithstanding the fact that the indictment made no such allegation. J.A. 2-4, 36-37.

The Court of Appeals for the Fifth Circuit in this matter concluded without analysis, relying primarily upon *United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979),

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5. Although the sufficiency of the allegations of the indictment were not challenged by petitioner's trial attorney it is well established that the sufficiency of the indictment may be challenged for the first time on appeal. *United States v. Beard*, 414 F.2d 1014, 1017 (3rd Cir. 1969). Moreover, we submit that the issues raised are cognizable under Rule 52(b), Federal Rules of Criminal Procedure, as plain error. See, e.g., *Silber v. United States*, 370 U.S. 717 (1962) (per curium); *Newport v. Fact Concerts, Inc.*, 69 L.Ed.2d 616 (June 26, 1981); *New York Central Railroad v. Johnson*, 279 U.S. 310 (1929); *Brasfield v. United States*, 272 U.S. 448 (1926); *Pipefitters Local 562 v. United States*, 407 U.S. 385, 442, n. 52 (1972).

cert. denied, 455 U.S. 903 (1980), that the allegations constituted "classic incidents" of check kiting which could be charged under § 1014. *United States of America v. William Archie Williams*, 639 F.2d 1311, 1319-1320 (5th Cir. 1981). See Appendix to Petition, A19-20.[6] *Contra, U ted States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981).

The Fifth Circuit panel in *United States v. Payne*, *supra*, at 1218, also found that giving an insufficient funds check to a bank could constitute the overvaluation of a "security" in violation of 18 U.S.C. § 1014. 602 F.2d at 1218. *Contra, United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978). The petitioner contends in this matter that the Fifth Circuit's rulings regarding 18 U.S.C. § 1014 are contrary to both the language and history of the statute and should be disapproved.

A. 18 U.S.C. § 1014 Focuses Upon Loans and Extensions of Credit and Does Not Extend to Checks or "Check Kiting"

The analysis of the meaning and reach of 18 U.S.C. § 1014 begins with the statute itself. 18 U.S.C. § 1014 provides:

> "Whoever makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions,] upon any application, advance, discount, purchase, purchase

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6. The indictment in this matter did not allege in Counts II and III that petitioner acted with intent to injure and defraud the bank. The Court instructed the jury on "check kiting" and apparently believed, as did the Fifth Circuit panel in *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), that such a charge was a necessary element of the offense.

> agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, the deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

As written, 18 U.S.C. § 1014 makes no reference to the cashing or depositing of checks, nor does it purport to prohibit what commonly is referred to as "check-kiting". See *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981), *petition for cert. filed*, No. 81-1047 (3rd Cir. Dec. 4, 1981). *Contra, United States v. Williams, supra; United States v. Payne, supra.* The statute as worded when originally enacted in 1948 focused upon federal agencies which had responsibility for making loans or other credit transactions primarily to farmers and homeowners.[7] The heading of § 1014 as originally enacted remains the same today, and underscores the focus of this statute: "Loan and credit transactions generally; renewals and discounts: crop insurance." Ch. 645, § 1014, 62 Stat. 952 (1948) (current version at 18 U.S.C. § 1014 (1970)).

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7. The institutions listed in 18 U.S.C. § 1014 (1970) as originally enacted were the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, any Federal intermediate credit bank, or the Federal Farm Mortgage Corporation, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or in which a Production Credit Corporation holds stock, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a National farm loan association or of a Federal Reserve bank.

As originally enacted, § 1014 was part of a bill passed to revise and codify Title 18 of the United States Code. In passing this bill, Congress was attempting to recodify the various criminal statutes which had been passed by the federal government prior to that date. Section 1014 as originally enacted in 1948 was derived from parts of 13 prior code provisions. H.R. 304, 80th Cong., 1st Sess. (1947), p. A85.

Each of the 13 predecessor statutes to § 1014 prohibited the making of false statements to particular federal agencies, the vast majority of which were primarily concerned with making loans to farmers and homeowners. *Id.* 7 U.S.C. §§ 1026(a) (1940 ed.), ch. 517, § 52, 50 Stat. 531 (1937) (current version at 18 U.S.C. § 1014) and 7 U.S.C. § 1514(a) (1940 ed.), ch. 30, § 514, 52 Stat. 76 (1946) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 596 (1940 ed.), ch. 6, § 22(h), 38 Stat. 272 (1913); ch. 653, § 3, 48 Stat. 1107 (1934) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 981 (1940 ed.), ch. 245, § 31, 39 Stat. 382 (1916); ch. 164, § 21, 49 Stat. 319 (1935) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1123 (1940 ed.), ch. 245, § 211(c) (1916), as added ch. 252, § 2, 42 Stat. 1459 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1138(d)(a) (1940 ed.), ch. 98, § 64, 48 Stat. 269 (1933); ch. 7, § 13, 48 Stat. 347 (1934) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1248 (1940 ed.), ch. 252, § 209, 42 Stat. 1467 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1312 (1940 ed.), ch. 252, § 216, 42 Stat. 1471 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1313 (1940 ed.), ch. 252, § 216, 42 Stat. 1471 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1441(a) (1940 ed.), ch. 522, § 22, 47 Stat. 739 (1932); ch. 614, § 203(a), 49 Stat. 704 (1935) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1467(a) (1940 ed.), ch. 64, § 8, 48 Stat. 134 (1933); ch.

168, § 12, 48 Stat. 647 (1934); ch. 150, §§ 20, 21, 49, 49 Stat. 298 (1935) (current version at 18 U.S.C. § 1014) and 15 U.S.C. § 616(a) (1940 ed.), ch. 8, § 16, 47 Stat. 11 (1932) (current version at 18 U.S.C. § 1014). The two predecessor statutes which do not focus only on making loans to farmers and homeowners nevertheless centered upon the making of loans. 12 U.S.C. § 596 (1940 ed.); 15 U.S.C. § 616(a) (1940 ed.). None of the prior statutes make mention of checks, their collection or check kiting. The transactions covered by the prior statutes and the wording of the statutes themselves in many instances involve collateral (usually real estate) given as security for loans and extensions of credit.

Significantly, nothing in the legislative history evidences a Congressional concern or a desire to deal with the problem of "bad checks" or "check kiting" in relation to the institutions which are protected by § 1014. *United States v. Sher, supra, United States v. Pavlick, supra; United States v. Edwards, supra.*

The 13 predecessor statutes to § 1014 either protected agencies and institutions which were not of the nature to be engaged in offering services such as checking and checking accounts or expressly related to loans without any mention or reference to check collection or check kiting.

An examination of the predecessor statutes supports the fact that Congress was concentrating on loans and credit transactions and not the depositing and collection of checks or "check kiting." 15 U.S.C. § 616(a) (1940 ed.), was part of a bill (H.R. 7360) creating the Reconstruction Finance Corporation. Public No. 2, 47 Stat. 11 (1932), 72nd Cong., 1st Sess. This bill authorized the appropriation of monies to be expended by the Secretary of Agriculture, in part, "for the purpose of making loans or advances to

farmers in the several States of the United States in cases where he finds that an emergency exists as a result of which farmers are unable to obtain loans for crop production during the year 1932. . . ." 15 U.S.C. § 602 (1940 ed.); ch. 8, § 2, 47 Stat. 5 (1932); ch. 520, § 2059(b), 47 Stat. 714 (1932); ch. 522, § (6)f, 47 Stat. 728 (1932); ch. 427, § 2, 54 Stat. 572 (1940). The bill also authorizes loans to banks and other institutions to "aid in financing agriculture, commerce, and industry including facilitating the exportation of agricultural and other products."

Title 7, U.S.C. § 1026(a) (1940 ed.) was enacted as part of the subchapter which created the Farmers' Home Loan Corporation. 7 U.S.C. § 1014 (1940 ed.), ch. 517, § 40, 50 Stat. 527 (1937). The Farmers' Home Corporation which was empowered to make loans or "rehabilitation loans" in the United States and elsewhere to enable certain qualified people to acquire farms (7 U.S.C. § 1001 (1940 ed.), ch. 517, § 1, 50 Stat. 522 (1937) (current version at 18 U.S.C. § 1014)), and to purchase livestock, farm equipment, supplies etc. . . . (7 U.S.C. § 1007 (1940 ed.), ch. 517, § 21, 50 Stat. 524 (1937) (current version at 18 U.S.C. § 1014)). 7 U.S.C. § 1514(a) (1940 ed.) is a part of the chapter cited as "Federal Crop Insurance Act" which was enacted so the federal government could provide crop insurance to protect against crop failure due to drought and other causes. 7 U.S.C. § 1502 (1940 ed.), ch. 30, § 502, 52 Stat. 72 (1938) (current version at 18 U.S.C. § 1014); 7 U.S.C. § 1508 (1940 ed.), ch. 30, § 508, 52 Stat. 74 (1938); ch. 563, 52 Stat. 835 (1938) (current version at 18 U.S.C. § 1014). This chapter created the Federal Crop Insurance Corporation. Security in this chapter refers to security for insurance premiums. 7 U.S.C. § 1508(b) (1940 ed.).

The heading of 12 U.S.C. § 596 (1940 ed.) demonstrates that overvaluation of security relates to security in

the sense of collateral for loans. The title reads "false statements or overvaluation of securities to secure loans. . . ."

12 U.S.C. § 981 (1940 ed.), 12 U.S.C. § 1123 (1940 ed.), 12 U.S.C. § 1138(d) (1940 ed.) and 12 U.S.C. § 1122, ch. 245, § 211(b) (1916) as added ch. 252, § 2, 42 Stat. 1459 (1923) (current version at 18 U.S.C. § 1014) all fall within the chapter titled "Farmers Credit Administration." 12 U.S.C. § 636 (1940 ed.), ch. 25, § 40, 48 Stat. 51 (1933) (current version at 18 U.S.C. § 1014). 12 U.S.C. § 981 (1940 ed.) refers only to "false statement in the application of such loan" or the willful overvaluation of "any loan offered as security for loans under the subchapter." 12 U.S.C. § 1123 (1940 ed.) similarly prohibits overvaluation of "property offered as security" for an advance or loan.

12 U.S.C. § 1122 (1940 ed.) does not reference overvaluation of security but rather deals only with false statements. 12 U.S.C. § 1312 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.) relate only to the National Agricultural Credit Corporation. Section 1313 prohibits overvaluation of property offered as security for an advance.

Finally, 12 U.S.C. § 1441(a) (1940 ed.) was part of a bill creating the Federal Home Loan Banks which were primarily concerned with the making of home mortgage loans.

From 1947 until 1970, a number of revisions were made in § 1014. These revisions, however, merely added new institutions to those previously specified in § 1014, or removed the names of certain institutions no longer in existence. The revisions did not change or alter the substantive wording of the statute nor did they mention check kiting or the problem of bad checks.

Thus the focus of the scant legislative history is upon attempts to mislead the specified institutions as to an ap-

plicant's credit worthiness, or the value of security offered for a loan or credit agreement. The Senate Banking and Currency Committee reflected this viewpoint in reporting upon the 1964 Amendment to § 1014, Pub. L. 88-353, § 5, 78 Stat. 269 (1964):

> "Section 5 of the bill would make it an offense . . . for anyone knowingly to make a false statement or report or willfully overvalue any land, property, or security to influence the action of a Federal credit union in connection with any application, loan, or the like * * * *Section 1014 is designed primarily to apply to borrowers from federal agencies or federally chartered organizations.* It is not, however, limited by its terms to borrowers and would seem also to apply to others, including, for example, officers and employees of the agencies and institutions named. * * * The committee was satisfied that it was appropriate to include Federal credit unions within Section 1014 in order to provide additional protection to Federal credit unions *against false statements or reports or willful overvaluations of land, property or security in connection with application for loans, etc.*" (Emphasis added)

S. Rep. No. 1078, 88th Cong., 2nd Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 2519, 2520, 2522, 2523. This viewpoint was again reflected in the House Banking and Currency Committee Report on the first 1970 Amendment to § 1014, Pub. L. No. 91-468, § 7, 84 Stat. 1017 (1970):

> "Section 7 of the bill amends Section 1014 of Title 18 . . . *relating to false statements in loan and credit applications, to include insured State-chartered credit unions.*" H.R. Rep. No. 91-1457, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 4166, 4187.

The amendments which may be considered to be directly involved in this matter include the addition of FDIC insured banks and FSLIC insured institutions, as well as others, to those institutions which § 1014 has reference. Remarks made on the House floor indicate that FSLIC insured institutions were included due to the perceived fraudulent overvaluing of property practices in relation to mortgages.[8]

The House Banking and Currency Committee Report on the latter 1970 Amendment to § 1014 again reflects a perception of the statute in terms of false statements as to creditworthiness, or as to the value of security for a loan. The pertinent provision of the amendment, Pub. L. No. 91-609, § 915, 84 Stat. 1815 (1970), was addressed in those terms:

> "Section 912 (later section 915) would describe more explicitly the institutions which are covered by 18 U.S.C. Section 1014, which provides penalties for making false statements or reports in connection with loans or other similar transactions." H.R. Rep. No. 91-1556, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 5582, 5617, 5652-53.

The conference report on the legislation as a whole (the Housing and Urban Development Act of 1970) reflects the same emphasis and, moreover, makes it clear that no special consideration was given to the potential consequences of including FDIC insured banks among the covered institutions.

> "The House Bill contained a provision not in the Senate Amendment providing criminal penalties for making false statements or reports in connection with loans or other similar transactions involving an insured sav-

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8. 116 Cong. Rec. 42632-33 (December 19, 1970).

> ings and loan association. The conference substitute contains a House provision with an amendment applying the same penalties to financial institutions insured by the Federal Deposit Insurance Corporation and credit unions insured by the National Credit Union Share Insurance Fund." Conf. Rep. No. 91-1784, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 5617, 5683-84.

In each instance that § 1014 has been amended, Congress only added new institutions to those previously specified in § 1014. A conclusion that Congress expanded the reach of § 1014 to cover a federal "bad check offense" or "check kiting" simply by specifying additional institutions is without legislative support and is unwarranted. This is demonstrated by remarks in the United States House of Representatives regarding the 1964 Amendment to 18 U.S.C. § 1014. The sponsor of this amendment stated:

> "The amendment is limited to federal credit unions and broadens existing law only to the extent of adding them to the statute." 109 Cong. Record 24791-24792 (1963).

There is no indication that the 1948 version of § 1014 was intended to have this reach, and the statute as revised in 1970 did not add any language even intimating that Congress intended to expand § 1014 to cover the depositing of checks or check kiting. Indeed, we are unaware of any reported case prior to 1978 involving prosecution under 18 U.S.C. § 1014 for only the submission of a check which, at the time it was presented for payment, was not covered by sufficient funds at the drawee bank to cover said check. It is not likely, if Congress had desired to utilize 18 U.S.C. § 1014 to prosecute bad checks, that the failure to utilize the statute as such would have passed unnoticed for so many years. *United States v. Enmons*, 410 U.S. 396

(1973).[9] This is especially true since prior to the original enactment of § 1014 (as will be discussed *infra*), virtually every state in this country and Congress itself, with respect to the District of Columbia, recognized the problem of bad checks by passing bad check laws. Comment on legislation, "Bad Check Laws," 44 Harv. L. Rev. 451, 451 & n. 13 (1931) (see statutes cited therein). See also pp. 24-30, *infra*.

Section 1014, if given a natural reading with overall consideration of the statute and its legislation, extends only to commercial and personal loan or credit transactions, not to bad checks and "check kiting." *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No 81-1317 (3d Cir. August 14, 1981), *petition for rehearing en banc denied* on October 6, 1981. *Contra, United States v. Payne, supra.* This conclusion is more compelling in light of the well established maxim of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971). See *Stafford v. Brigg*, 444 U.S. 527 (1980).

> "In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime it is appropriate, before we choose the harsh alternative, to require that Congress should have spoken in language that is clear and definite." 404 U.S. at 347.

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9. As stated by this Court in *Enmons*:

"It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." See *United States v. Laub*, 385 U.S. 475, 485 (1967).

The history of 18 U.S.C. § 1014 has been carefully reviewed in only a few lower court decisions which have raised issues similar to the ones now before this Court. In all but one instance, the decision has been against including "check kiting" and bad checks within the reach of § 1014. *United States v. Sher, supra; United States v. Edwards, supra; United States v. Pavlick, supra; United States v. Payne, supra.*

As stated by the District Court in *United States v. Pavlick*:

> "In short, review of the legislative history vindicates the *Edwards* interpretation of Section 1014. The statute simply criminalizes fraud in credit transactions. Congress never intended that the measure reach schemes such as check-kiting, which remain within the exclusive jurisdiction of the states. Accordingly, the Government is incorrect in asserting that the indictment charges Pavlick with the violation of federal law." 507 F. Supp. at 364. See also *United States v. Sher, supra; United States v. Edwards, supra.*

Simply stated, the mere deposit of a check for collection does not rise to the level of a request for a loan or a credit transaction as contemplated by 18 U.S.C. § 1014.

B. Neither the Legislative History nor the Language of the Statute Itself Supports the Expansion of Federal Criminal Jurisdiction Into an Area Which Is Covered by State Statutes

As further evidence that Congress did not intend to extend 18 U.S.C. § 1014 to the problem of bad checks or to check kiting is the fact that virtually all American state jurisdictions have enacted statutes which specifically criminalize the passing of a check drawn upon an account having

insufficient funds to satisfy the check, at least where the drawer knows or even intends that sufficient funds are or will be lacking to cover the checks. See *United States v. Payne*, 602 F.2d 1215, 1218 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980).[10]

Bad check statutes became widespread early in this century as the Federal Reserve System facilitated the use of checks as a medium of exchange.[11] Congress evidenced its awareness of the "bad check" problem and its legislative remedies *prior to the original enactment of § 1014* when it enacted a provision for the District of Columbia which expressly governed bad checks. Ch. 273 42 Stat. 820 (1922).[12]

The District of Columbia bad check provision is typical in most respects of state "bad check" legislation, most of which require as an element of proof that the defendant intended to defraud the bank. See, e.g., *Ciallo v. United States*, 325 F.2d 227 (D.C. Cir. 1963); Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues and Proposals, 38 Mo. L. Rev. 432, 436 & n. 29, 437 (1973). Prima facie establishment of knowledge, intent and purpose, by the fact of nonpayment, should the drawer fail to make good the draft within a specified period after notice of dishonor, also is typical of American "bad check"

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10. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973); Comment on legislation, "Bad Check Laws," 44 Harv. L. Rev. 451, 453 & n. 13 (1931).

11. 44 Harv. L. Rev. 451, 453 & n. 13 (1931) (see statutes cited therein).

12. Congress also amended the District of Columbia bad check statute in 1970, the year that Congress extended § 1014 to the Federal Deposit Insurance Corporation, FDIC insured banks, the Federal Savings and Loan Insurance Corporation, etc. . . ., and this provision remained applicable through and beyond 1973. D.C. Code Ann. § 22-1410 (1973).

legislation.[13] Most state statutes can be read as inapplicable where the drawer reasonably expected that the check would be satisfied when presented to the drawee in due course; many state courts have interpreted their "bad check" legislation as affording a reasonable expectation of payment defense.[14] Some statutes specifically provide a defense if the payee was informed that the check was not presently covered by sufficient funds when it received the check.[15] A few state statutes raise the fact of payment within a stated period after notice of the drawee's refusal to honor the check to the status of an affirmative defense.[16]

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13. E.g., Ala. Code § 13-4-118 (1975); Alaska Stat. § 11.20.220 (1970); Conn. Gen. Stat. § 53a-128 (1980); Del. Code Ann. tit. 11, § 900 (1974); Fla. Stat. Ann § 832.07 (West, 1970); Ga. Code § 26-1704 (1981); Haw. Rev. Stat. § 708-857 (1976); Kan. Stat. Ann § 21-3707 (Vernon, 1980); La. Rev. Stat. Ann. § 14:71 (West, 1981); Me. Rev. Stat. Ann. tit. 17-A, § 708 (1981); Mass. Gen. Laws Ann. ch. 266, § 37 (West, 1970); Mich. Comp. Laws Ann. § 750.132 (1981); Minn. Stat. § 609.535 (1980); Miss. Code Ann. § 97-19-57 (1981); Mo. Rev. Stat. § 570.120 (1978); Mont. Rev. Codes Ann. § 94-6-309 (1977); Neb. Rev. Stat. § 28-611 (1979); Nev. Rev. Stat. § 205.132 (1979); N.J. Stat. Ann. § 2C:21-5 (1981); N.M. Stat. Ann. § 30-36-6 (1980); Ohio Rev. Code Ann. § 2913.11 (Page, 1975); Okla. Stat. tit. 21, § 1541.4 (1980); Pa. Cons. Stat. Ann. § 4105 (Purdon, 1973); R.I. Gen. Laws § 19-19-4 (1981); S.C. Code § 34-11-70 (1980); Tenn. Code Ann. § 39-1906 (1975); Tex. Penal Code Ann. tit. 7, § 31.06 (Vernon, 1974); Vt. Stat. Ann. tit. 13, § 2022 (1974); Va. Code § 18.2-183 (1981); Wis. Stat. Ann. § 943.24 (1981); Wyo. Stat. Ann. § 6-3-125 (1981). See generally A.L.I. Model Penal Code § 224.5 (1962).

14. E.g., *Harris v. State*, 378 So.2d 257 (Ala. Crim. App. 1979), *cert. denied*, 378 So.2d 263 (Ala. Sup. Ct. 1979); *People v. Poyet*, 6 Cal.3d 530, 492 P.2d 1150, 99 Cal. Rptr. 758 (1972). *See Reasonable Expectation of Payment As Affecting Offense Under "Worthless Check" Statutes*, 9 A.L.R.3d 719.

15. Fla. Stat. Ann. § 832.05(2)(a) (West, 1979); Ind. Stat. Ann. § 35-43-5-5(f)(1) (Burns, 1981); Kan. Stat. Ann. § 21-3707(3)(b) (Vernon, 1980); N.M. Stat. Ann. § 30-36-6 (1980); N.D. Cent. Code § 6-08-16(1) (1981); S.C. Code § 34-11-60(d) (1980); W. Va. Code §§ 61-3-39. 61-3-39a (1981); *Cf.* S.D. Codified Laws Ann. §§ 22-41-2.2 (1979).

16. Ind. Stat. Ann. § 35-43-5-5(e) (Burns, 1981); N.H. Rev. Stat. Ann. § 638.4 (III) (1974); N.Y. Penal Law § 190.15(1) (McKinney, 1975); N.D. Cent. Code § 6-08-16(3) (1981); W. Va. Code § 61-3-39b (1981); Wyo. Stat. § 6-3-124(a) (1981).

Read against this background of bad check legislation and in the face of the enactment by Congress of a bad check law for the District of Columbia, the position of the United States that § 1014 criminalizes the willful passage of an insufficient funds check to an FDIC insured bank depends upon the speculative assumption that Congress intended when it passed § 1014 to make broad inroads into state jurisdiction. In this regard, it is a well established maxim of statutory construction of federal statutes that the judiciary should not assume that Congress intended a major expansion of federal criminal jurisdiction in enacting its criminal laws. *United States v. Enmons*, 410 U.S. 396 (1973); *United States v. Bass*, 404 U.S. 336 (1971). As previously discussed, there is nothing in the legislative history of § 1014 which supports the conclusion that Congress intended to regulate the area of bad checks, an area where there has been extensive state legislation.

The Fifth Circuit in *United States v. Payne, supra*, placed reliance upon the changes made to § 1014 in 1970 in concluding that "the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies." 602 F.2d at 1219. However, the legislative history for the 1970 amendment provides no support for such an expansion of the substantive force of § 1014. It simply adds institutions to the protected list at a time when virtually all states had bad check legislation.

> "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass, supra*, at 349.

In justifying its expansion of § 1014 to cover "check kiting" the Fifth Circuit in *Payne* also accorded significance to the fact that the 1970 amendment to § 1014 added institutions which were in fields other than farming and construction. Of more significance, however, is the fact that Congress when amending § 1014 in 1970 made no change to the substantive provisions of the statute, and did not discuss, confront or raise the bad check problem in the legislative history. Congress neither stated nor implied that it was expanding the reach of Section 1014 to enter a field already comprehensively regulated by the states. Given its passage of the District of Columbia bad checks law and the array of state legislation on this topic, Congress knew of the means available to express and effectuate any such intention. *Bell v. United States*, 349 U.S. 81, 83 (1955). Congress has never done so. The question is not whether Congress *could* have fashioned a federal statute to prosecute the presentment of "bad checks" or "check kiting", but rather whether Congress intended to do so. The Court in *Payne*, relying on Whitney, *The Law of Modern Commercial Practice*, § 341 (1965), concluded that "in giving a check one impliedly represents that he has on deposit" at the drawer bank "funds at least equivalent to the face amount of the check". The Fifth Circuit panel, however, failed to disclose the fact that Whitney reaches this conclusion by relying upon the enactment of the state bad check laws, not on the passage of 18 U.S.C. § 1014.[17] The lack of legislative history regarding 18

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17. Whitney, *Law of Modern Commercial Practice*, § 341 (1965) reads in relevant part as follows:

§ 341. "Bad" Checks.

In giving a check, the drawer impliedly represents that he has on deposit with the drawee bank funds equivalent to the face amount of the check. *If he has not, not only has he broken his promise to the holder that the check would*

(Continued on following page)

U.S.C. § 1014 as well as a reasonable analysis of the language utilized does not justify such a broad expansion of interpretation of this statute which would impact so seriously upon notions of judicial comity.

C. A Check, As a Matter of Law Is Not "a Security"

Counts II and III of the indictment similarly alleged that the petitioner overvalued "a security, that is a check" by the mere fact of presenting the check for deposit. As discussed *infra*, § 1014 does not purport to prohibit the overvaluing of *"a security."* It prohibits, rather, the overvaluation of security; security in the sense of collateral. Given the focus of the statute upon loans and credit transactions (see discussion, pp. 14-24, *supra*), this is the reasonable interpretation of the word "security."

Support for the proposition that under § 1014 the word "security" is being used in the sense of collateral is also found in the predecessor statutes to § 1014. 12 U.S.C. § 1123 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.), for example, state, in identical language:

> "Whoever willfully overvalues *any property offered as security for any such advance* shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

Footnote continued—

be paid upon due presentment, but he has also been guilty of such fraud and misrepresentation as to be punishable as a crime, under statutes known as "bad check" laws. Although these statutes vary in different states, they all make the giving of a check without sufficient funds in the bank, and with the intent to defraud, a criminal offense, and they usually treat the making and issuing of such a check prima facie evidence of intent to defraud and of knowledge of the insufficient funds at the time. (Emphasis added)

The bill of which 15 U.S.C. § 616(a) (1940 ed.) was a part expressly provided that all such loans be "fully and adequately secured." 15 U.S.C. § 616(a) (1940 ed.) prohibited the willful "overvalu[ing] of security, for the purpose of obtaining . . . any loans . . ." In light of the overall structure and wording of this prior statute it is clear that it focused on loans with the word "security" meaning security in the sense of collateral.

The interpretation of the words "overvalues . . . any security" as meaning security as collateral for a loan is also evidenced by 12 U.S.C. § 596 (1940 ed.). The heading of this section reads: "False statement or overvaluation of securities to secure loans, etc. . . ." Therefore, the plain and unmistakable purpose of this statute is to prohibit the overvaluing of security in the sense of collateral.

12 U.S.C. § 1441(a) (1940 ed.) includes the words "whoever willfully overvalues any security." In the context of this statute, "security" clearly means security as collateral for home loans since the Chapter containing this statute ("Federal Home Loan Bank Act") is primarily concerned with the providing of financing for home purchases. 12 U.S.C. § 1430 (1940 ed.), ch. 522, § 10, 47 Stat. 731 (1932); ch. 168, § 10, 48 Stat. 646 (1934); ch. 847, § 501, 48 Stat. 1261 (1934); ch. 150, §§ 5, 6, 49 Stat. 294 (1935), for example, provides in part that the "Federal Home Loan Bank is authorized to make advances . . . upon the security of home mortgages. . . ."

7 U.S.C. § 1514(a) (1940 ed.) is a bill providing for the issuance of crop insurance for crop failure, etc. This statute prohibited the "willful overvaluing of security" but the security as mentioned in the bill is as follows:

> ". . . Such premiums shall be collected at such time or times, in such manner, and upon such security as the

> Board may determine." 7 U.S.C. § 1508(b) (1940 ed.) (1938).

Clearly, security here means security in the sense of collateral.

12 U.S.C. § 1313 (1940 ed.) is titled "Overvaluation of property as security", again clearly in the sense of collateral. 12 U.S.C. § 981 (1940 ed.) reads, in relevant part, ". . . who shall willfully overvalue any land offered as security. . . ." See also, 12 U.S.C. § 1123 (1940 ed.) ("overvaluation of property offered as security for loan").

The Fifth Circuit in *United States v. Payne* concluded that a check is "a security" based on 18 U.S.C. § 2311, which is in the Chapter of Title 18 which deals with stolen property, and which specifically defines "a security" to include checks and notes for purposes of that chapter. From this the Fifth Circuit panel leaped to the conclusion that "security" as used in the Chapter on fraud and false statements (which includes 18 U.S.C. § 1014) also includes checks, despite the fact that said chapter contains no similar definition or provision. *Id.*, p. 1218. In light of the fact that § 2311 serves an entirely different function and purpose from § 1014, and in absence of a definitional provision, the language of a criminal statute should be strictly construed.

> "It remains true that penal statutes are to be strictly construed, with ambiguities resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411. See also *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

The Eighth Circuit in *United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) reviewed the definition of security in 18 U.S.C. § 2311 and recognized the fact that the definition of "securities" in this statute was broader than those under other federal

statutes. The ambiguity surrounding the definition of "security" can also be shown in another context. For example, the Fifth Circuit stated with respect to whether or not a note is a security that "the four elements of a security . . . are: (1) the presence of an investment; (2) a common venture; (3) a reasonable expectation of profits; and (4) such profits to be derived from the entrepreneural or managerial efforts of others." *American Bank of Nashville v. Gunter,* 620 F.2d 1108, 1116 (5th Cir. 1980). See also, *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 848, 858 (1975).

Pertinent factors in ascertaining security status in *Gunter* included whether the instrument was accompanied by an expectation of appreciation and value; or whether it involved a variable rate of return. *Id.* at page 1117. The Fifth Circuit concluded that an interest bearing note representing a participation interest in a loan did not constitute a "security". Obviously any contention that a personal check is a "security" is even less tenable.

The Fifth Circuit in *Payne* also quoted Ga. Code Ann. § 109A-4-208(1)(A)(C) which provides in part:

> "A bank has a security interest in . . . an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied . . . and, if it makes an advance on or against the item."

This rendition of the Uniform Commercial Code is not the same as the provision in Louisiana which states that the bank has a lien, not a security interest. Nevertheless, the fact that a bank may have a security interest *in* a check does not mean that the check is "a security." Given the ambiguity surrounding the definition of "a security," this statute should be strictly construed in favor of the petitioner.

D. A Check Is Not "Security" Within the Meaning of 18 U.S.C. § 1014 As Alleged by Counts II and III of the Indictment

Counts II and III fail to allege that the check at issue in each count was "security" in the sense of collateral for a loan or credit transaction. On this basis alone, Counts II and III should be dismissed even if this Court should conclude that a check can be security in the sense of collateral for a loan or other debt to a bank. See *Russell v. United States*, 369 U.S. 749 (1962). There simply is no allegation in this matter that the petitioner negotiated, requested or entered into any agreement (oral or otherwise) with the bank for it to issue immediate credit and to utilize the check as security for that extension of credit. J.A. 2-4. Cf. *United States v. Pavlick*, 507 F. Supp. 359, 365, n. 15 (N.D. Penn. 1980). Rather it is contended that the petitioner did no more than deposit the check in the collecting bank. J.A. 2-4. See also J.A. 7-10, 12-17, 28; Tr. p. 36.

Where a bank extends credit on an uncollected check, the check is not collateral on an obligation but is the obligation itself; such an advance of funds is an unsecured extension of credit.[18] The Louisiana Revised Statutes specifically provide that a check does not operate as an assignment of any funds. La. Rev. Stat. Ann. § 10:3-409(1). Where a bank extends funds on an uncollected check, and the check is then not honored, the bank merely has the right to have the check honored by the drawer. La. Rev. Stat. Ann. § 10:3-413(2). The check becomes an enforceable obligation; it is not security on an obligation:

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18. That is not to suggest that an individual could not give a check to a bank to secure an extension of credit or a loan. *See e.g. United States v. Pavlick*, 507 F. Supp. 359, 365, n. 15 (M.D. Penn. 1980). However, this is not what was alleged in this case.

> "Overdrafts, such as those involved here, do not leave a bank in the situation of having paid out money without a legally binding obligation for repayment. The Uniform Commercial Code, as well as other Code sections, not only creates an obligation between the drawer of the overdraft check and the payor bank, but also provides remedies for collection either on the check itself, on the money itself, or upon the obligation for which the check was drawn. In other words, the bank may enforce the debt created by the overdraft in the same manner as any loan or promissory note would be enforced." *United States v. Christo*, 614 F.2d 486, 493 (5th Cir. 1980).

It should be emphasized that a bank is not obligated to give immediate credit on a check; doing so, at least in the case of this issue, is a unilateral credit decision. La. Rev. Stat. Ann. § 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is an unsecured extension of credit, evidenced by the check. The government's evidence in the instant case so demonstrates. See J.A. 21-22. Under such circumstances the amount shown payable on a check is no different from the amount shown payable on an unsecured demand note.

Since the check upon which such funds are advanced constitutes the obligation itself, and not security on an obligation, it cannot be said that such a check is "security" within the meaning of § 1014. Therefore a check, under the instant circumstances, is not security in the sense of collateral, nor is it "a security".

E. Expansion of § 1014 As Contended by the Government Will Allow Federal Prosecution of Bad Checks and Check Kiting Without Proof of Intent to Fraud

Counts II and III of the indictment each allege, and the facts adduced at trial show, only presentment of a check for deposit and no more. J.A. 2-4, 7-10, 12-17, 28; Tr. p. 36. The indictment does not allege a "check kiting" scheme nor does it allege an intent to defraud the bank. However, the Fifth Circuit in *Payne* went to great lengths to emphasize that a check kiting scheme was present as apparent justification or rationalization for its expansive reading of § 1014. 602 F.2d at 1217, 1218.

> "Here, we are not dealing with a man careless in balancing his check book. We have here two businessmen who contrived a kiting scheme that would have the effect of giving them credit or a loan or an advance on their false representation of the value of their checks." *Id.*

In light of *Payne's* emphasis on "check kiting," it is clear that the court in *Payne* did not intend to make proof of the mere deposit of a check with insufficient funds (as alleged in Counts II and III) sufficient to support a conviction under § 1014. This requirement of a "check kiting scheme" under § 1014 constitutes no more than judicial legislation which has the effect of expanding the reach of § 1014 without requiring the elements of proof normally required for a check kiting scheme, that is, proof of intent to defraud.

The panel in *Payne* stated its ruling was, in actuality, that *check kiting* could be a violation of 18 U.S.C. § 1014:

> This appeal presents the question whether "check kiting" violates 18 U.S.C. § 1014. We hold that it does.

Payne at 1216.

The panel then emphasized that check kiting was a *scheme to defraud*:

> " 'Check kiting, as practiced here, involves more than the mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the bank involved into a feeling of confidence and security . . . .' In short, check kiting, as engaged in by [the defendants], was a device for fraudulently obtaining credit sufficiently in the nature of an advance or loan to come within the scope of 18 U.S.C. § 1014."

Payne at 1219, *quoting Fidelity and Casualty Company of New York v. Bank of Alterberg*, 216 F.2d 294, 302-03 (8th Cir. 1954).

The panel apparently failed to appreciate, however, that 18 U.S.C. § 1014 is virtually a strict liability statute. As applied since its initial passage, intent to defraud is not an element of the offense. *United States v. Sabatino*, 485 F.2d 540, 544, 545 (2nd Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) ("Proof that an applicant did not intend to defraud the bank is irrelevant to whether he intended to influence the bank by false statements.") If a knowingly false statement is proven, then a conviction is authorized. Any necessary proof of criminal intent, or *mens rea*, is minuscule.

The panel in *Payne*, nevertheless, apparently sought only to create a violation of § 1014 based upon the "overvaluation" of a check, where a fraudulent scheme was present. However both the language of § 1014 and the decisions construing it make it all too clear that this statute is totally inappropriate to the panel's intended end.

If left to stand, actions traditionally thought of as being dependent upon an intent to defraud will be made criminal without such proof. See 18 U.S.C. § 1341 (1970); *United States v. Gross*, 416 F.2d 1205, 1206 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). J.A. 11-12, 28-29. *Payne* itself recognized that "all states have 'bad check' laws" based on the concept that giving a kited check is a form of fraud and misrepresentation.[19] 602 F.2d at 1218. Therefore, the scope of § 1014 should not be expanded to reach "check kiting."

II. COUNTS II AND III OF THE INDICTMENT MUST BE DISMISSED BECAUSE A NON-COLLECTED CHECK UPON WHICH A BANK EXTENDS CREDIT BECOMES AN ENFORCEABLE OBLIGATION WHICH CANNOT BE VIEWED AS "OVERVALUED", NOR AS A "FALSE STATEMENT" UNLESS IT IS UNENFORCEABLE

The government is contending in the case at issue that by presenting a check to a collecting bank for deposit, the petitioner necessarily was representing that at that time he had funds deposited in the drawee bank account in an amount equal to or greater than the amount shown on the check. J.A. 2-4. No questions were asked, nor was any evidence adduced at the trial of this matter which reflected any representations by or conversations between the petitioner and the person to whom the checks at issue were presented for deposit. J.A. 7-10, 12-17, 28; Tr. p. 36. Therefore, the government's case relies solely upon

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19. It should also be noted that "virtually every insufficient funds statute require specific intent to defraud. The prosecution must separately prove this element, and the mere passing of an insufficient funds check will normally not imply such intent." Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973).

theory that the check by itself constitutes the misrepresentation or false statement.

The representations inherent in commercial paper are specifically delineated by the Uniform Commercial Code, although these statutes vary from state to state. Under the Louisiana Revised Statutes, a check is a draft drawn on a bank and payable on demand. As such, a check is an order to pay a sum certain in money, signed by the drawer, payable on demand and payable to order or to bearer. La. Rev. Stat. Ann. § 10:3-104(1) (1975). A check does not "operate as an assignment of *any* funds in the drawee available for its payment. . . ." La. Rev. Stat. Ann. § 10:3-409(1) (1975). The contract of the drawer is set out by La. Rev. Stat. Ann. § 10:3-413(2) (1975):

> "The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any endorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

In effect the check is an unconditional promise to pay a sum certain. Thus the drawer does not represent by the mere act of presenting a check for deposit in a collecting bank that the check will not be dishonored; rather he only represents that if dishonored he will pay the check after any necessary notice of dishonor and protest. Although he may disclaim that representation by drawing "without recourse", that is not the issue in this case since checks were not drawn without recourse.

In the instant case, this is exactly what the petitioner did. After notice of dishonor he took the steps necessary to pay the check. J.A. 12, 14, 16-17, 30-35; Tr. pp. 35-36. The government's theory depends upon the unreasonable conclusion that a check returned for insufficient funds is

without value. Clearly, an uncollected check has value in that it is an enforceable obligation; such obligation being enforceable to the face amount of the check. La. Rev. Stat. Ann. § 3-413(2) (1975). The check in fact is an asset of the bank where credit has been given. J.A. 22-23.

The Court in *United States v. Edwards*, at 1356-57, ruled that the face amount of a check cannot constitute a false statement because:

> "[A] check . . . is not the type of statement which can be true or false . . . . [A] check is simply a direction to a bank to pay the instrument according to its terms. A direction can be neither true nor false . . . only assertions of fact are capable of being true or untrue and it would seem that Section 1014 is designed only to prohibit such false statements of fact in connection with for example, an application for a loan." 455 F. Supp. at 1356-1357.

The face amount of a check arguably might be part of a false statement in a case where the drawer fails to honor the check upon dishonor and any necessary notice of dishonor and protest. A check, by statute, carries the representation that the drawer will take such action under such circumstances unless drawing without recourse. Therefore, a drawer's failure to do so might arguably support a jury finding that his representation that he would do so was false. However, this was not alleged by Counts II and III. Under the statute governing the checks at issue, the petitioner did no more than represent that he would pay the instrument if dishonored after receiving notice of dishonor. La. Rev. Stat. Ann. § 10:3-413(2) (1975). Consequently, there was no false statement as alleged in Counts II and III.

CONCLUSION

For the reasons stated above, petitioner prays that his conviction on Counts II and III of the indictment be reversed and that said counts be dismissed with prejudice. Petitioner further prays, in light of the significant prejudicial evidence introduced at trial on Counts II and III, that the conviction on Count I of the indictment be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Brief for Petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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This 26th day of February, 1982.

NICKOLAS P. CHILIVIS

Supreme Court, U.S.
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No. 80-2116

In the Supreme Court of the United States

October Term, 1981

WILLIAM ARCHIE WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER ON THE MERITS

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SUPPLEMENTAL BRIEF FOR PETITIONER ON THE MERITS

We wish to bring to the attention of the Court the recent decision of *United States v. Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo,* Docket Nos. 81-1192, 1195, 1196, 1197, 1203, 1204, 1254 (2nd Cir. April 1, 1982) which addresses the applicability of 18 U.S.C. §1014 to the deposit of certified checks drawn on a fictitious offshore bank. The Second Circuit in *Krown* reversed the convictions under 18 U.S.C. §1014. *Id.*, pp. 1, 9.[1]

1. As of the date of the printing of this supplemental brief, *United States v. Krown, et al.* has not yet appeared in the slip opinions. Therefore, citations are to the page of the typed opinion which was filed with the Clerk of the Second Circuit Court of Appeals on April 1, 1982.

In *Krown*, the defendants apparently obtained large amounts of money from a number of individuals "by the use of fraudulent financial instruments held out as being issued by" certain fictitious banks. *Krown*, p. 2. While the facts of *Krown* are different and more egregious than the facts in the case before this Court,[2] *Krown* is supportive of petitioner's position in at least two respects.

First, the Second Circuit in *Krown* addressed the question whether §1014 applies to the deposit of bad checks and concluded that §1014 is limited in scope to credit transactions. *Krown*, p. 7. (Pet. Br. 14-24; Pet. R. Br. 4-6).[3]

> "The Third Circuit cases express concern about the possibility that an expansive reading of §1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congressional intent.
>
> We agree that §1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to specified credit transactions, must be given effect. The Second Circuit has warned against construing §1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States v. Sabatino*, 485 F.2d 540, 543 (2nd Cir. 1973), *cert. den.*, 415 U.S. 948 (1974)." *Krown*, p. 7.

Consistent with petitioner's argument that the mere deposit of a check, as alleged in Counts II and III, does

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2. In *Krown*, the checks at issue were certified and were drawn on a bank which did not exist. Therefore, the purported certification of the check itself was false.

3. The court stated that it was unnecessary for it to "choose between the Fifth Circuit and Third Circuit views regarding the applicability of §1014 to check kiting schemes . . . ." *Krown*, pp. 7-8.

not rise to the level of a credit transaction or a loan (Pet. R. Br. 4-6), the Second Circuit also concluded:

> "The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute." *Krown*, p. 8.

In reaching this conclusion, the Second Circuit distinguished *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978) by pointing out that *Stoddart* "involved an agreement by a bank to permit a withdrawal from an account following a fraudulent representation to the bank by the depositor." *Krown*, p. 9. The defendant in *Stoddart* was attempting to convince the bank to give him credit on a check which he falsely represented orally to have been deposited in another branch of the bank. (See Pet. R. Br. 5-6).

Second, consistent with petitioner's argument, distinguishing the representation made by a *certified* check,[4] the Court in *Krown* also concluded that "a fraudulent *certified* check can be a false statement within the meaning of § 1014." *Krown*, p. 6. (Emphasis added). In reaching this conclusion, the Court emphasized that "a [certified] check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation." *Id.* See *supra* note 4, at 3. As previously argued by the petitioner, the representations embodied by an ordinary check are not the same as those embodied by a certified check. *Id.* (Pet. R. Br. 6-8). In the case before this Court, the two checks at issue were *not* certified, the banks upon which said checks were drawn were in existence and, significantly, the checks were paid by the petitioner in accordance with the representations made by the checks. *Id.* (J.A. 16-17, 21, 35; Tr. 35-36).

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4. See La. Rev. Stat. Ann. §10:3-413(2) (1975); §10:3-104(2)(c); §10:3-411(1) (1975). (Pet. R. Br. 6-8).

On behalf of the petitioner, we again submit that Counts II and III of the indictment should be dismissed with prejudice, and that Count I should be reversed for a new trial.

Respectfully submitted,

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No. 80-2116

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's "check kiting" scheme falls within the prohibition of 18 U.S.C. 1014.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 639 F.2d 1311.

JURISDICTION

The judgment of the court of appeals (Pet. App. A22) was entered on March 19, 1981. The petition for a writ of certiorari was filed on June 13, 1981, and was granted on November 9, 1981. The grant of the petition was amended on December 7, 1981 (J.A. 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land,

property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on one count of misapplying bank funds, in violation of 18 U.S.C. 656 (Count I),[1] and on two counts of "check kiting," in violation of 18 U.S.C. 1014 (Counts II and III).[2] He was sen-

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[1] Count I, in pertinent part, charged that (J.A. 2-3):

> Beginning on * * * December 20, 1977 and continuing * * * to May 9, 1978 * * * WILLIAM ARCHIE WILLIAMS, being an officer * * * of * * * Pelican State Bank * * * a bank the deposits of which are insured by [FDIC] * * * with intent to injure and defraud said insured bank, did willfully and knowingly misapply * * * monies and funds of said bank, in the amount of $58,055.44 * * * by converting to his own personal use said sum, all in violation of [18 U.S.C. 656] * * *.

[2] Count II, in pertinent part, charged that (J.A. 3):

> On * * * May 9, 1978 * * * WILLIAM ARCHIE WILLIAMS, did knowingly and willfully overvalue * * * a security, that is a check dated May 9, 1978, drawn on the account of W. A. Williams * * * at the Winn State Bank * * * in the amount of $58,500.00 * * * for the purpose of influencing the Pelican State Bank * * *, a bank the deposits of which are insured by [FDIC] * * *, upon an advance of money and extension of credit in that the Defendant presented said check for deposit at Pelican State Bank * * * and represented * * * to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the Defendant then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank * * * to cover said check, all in violation of [18 U.S.C. 1014] * * *.

Count III charged, in similar language, that on May 10, 1978, petitioner deposited a $60,000 check in the Winn State Bank, drawn on his account at the Pelican State Bank, for the pur-

tenced to six months' imprisonment on Count III and five years' probation on Counts I and II. The court of appeals affirmed (Pet. App. A1-A21).

1. The evidence at trial showed that, soon after purchasing a majority interest in the Pelican State Bank in Pelican, Louisiana, in 1975, petitioner appointed himself bank president (Tr. 121, 168-169, 171-172).[3] The bank was a relatively small institution, with only $3,000,000 in assets (Tr. 251).

For several years prior to petitioner's purchase of the bank, it had maintained a "dummy account" to pay checks drawn on the bank by customers who had insufficient funds in their individual checking accounts to cover their obligations (Tr. 6-7, 24-25). A check cleared through the dummy account would be paid from the bank's general assets and held in the account until the customer deposited sufficient funds of his own to cover the check. The check would then be posted to the customer's account and the figure for accumulated checks in the dummy account would be reduced. The dummy account statement was adjusted each business day to indicate the bank's loss of funds used to provide this overdraft service (Tr. 7, 25, 87-88). The bank apparently charged no interest for use of the dummy account (Tr. 114, 121-122).[4]

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pose of influencing the Winn State Bank to advance money when he knew he had insufficient funds in his Pelican account to cover the check (J.A. 3-4).

[3] "Tr." refers to the trial transcript.

[4] The dummy account was subject to criticism by bank management. The bank's board of directors requested petitioner to abolish the account, but petitioner took no action to eliminate it (Tr. 9). Petitioner was the only bank officer who utilized the account (Tr. 21).

Between December 1977 and May 1978, petitioner enjoyed essentially unlimited use of the dummy account. By May 2, 1978, petitioner's overdrafts amounted to $58,055.44—approximately 50% of the total overdrafts then covered by the dummy account (Tr. 9, 11, 37, 87-88, 124-125).

On May 8, 1978, federal and state bank examiners commenced an audit of the Pelican State Bank (Tr. 94). That same day, petitioner opened a personal checking account at the Winn State Bank in Winnfield, Louisiana, with a deposit of $4,649.97 (Tr. 64-65, 91; Pet. App. A5). The next day, May 9, petitioner deposited into his checking account at Pelican State Bank a check for $58,500 drawn on his newly opened account at Winn Bank (Tr. 28-30, 87-88). Prior to making that deposit, petitioner's account at Pelican showed a balance of $8.33 (Tr. 87). Pelican immediately credited the sum of $58,500 to petitioner's account. This covered petitioner's checks totalling $58,055.44, which previously had been cleared through the dummy account. At the close of business on May 9, 1978, petitioner's account at Pelican showed a balance of $452.89 (Tr. 28-30, 87; Pet. App. A5).

On May 10, 1978, petitioner deposited a $60,000 check drawn on the Pelican Bank into his Winn account (Tr. 62-64, 88-89). Winn accordingly credited the $60,000 to petitioner's account and routinely paid the May 9th check for $58,500 when the check cleared for payment on May 12, 1978 (Tr. 64, 89; Pet. App. A6). The $60,000 check, in turn, was presented by Winn to Pelican for payment. Because petitioner's account had insufficient funds to cover the check, however, Pelican again cleared the check through the dummy account (Tr. 32-34, 97).

Petitioner attempted to balance his Pelican account on May 16 by depositing a check for $65,000 drawn on his accounts at Sabine State Bank in Many, Louisiana (Tr. 89). Pelican credited petitioner's account for $65,000 upon deposit of the check, and posted to his account the $60,000 check that had cleared through the dummy account (Tr. 32-34, 97-98). Petitioner, however, had insufficient funds in his Sabine accounts to cover the $65,000 check, and Sabine refused payment when the check was presented on May 17, 1978 (Tr. 69-71; Pet. App. A6). Pelican therefore charged the $65,000 to petitioner's account on May 23 (Tr. 35-36). Petitioner then purchased a $65,000 money order with the proceeds of a real estate mortgage loan obtained from the Sabine Bank on May 18, 1978, and settled his account with Pelican State Bank (Tr. 68-69).

As a result of depositing checks whose face value uniformly exceeded the amount of funds backing them in his personal accounts at the drawee banks on the dates of the drafts, petitioner was able to obtain significant amounts of interest-free credit for substantial periods of time (Tr. 91, 114). For example, Pelican Bank credited petitioner's account with the $58,000 check drawn on Winn Bank from May 9, 1978, to May 12, 1978, when the check was presented to Winn for collection. Similarly, petitioner obtained interest-free credit from the Winn Bank from May 10, when he deposited the $60,000 check drawn on Pelican, to May 11, when Pelican cleared it through the dummy account. Finally, petitioner obtained $65,000 of interest-free credit from Pelican Bank from May 16, when he deposited a $65,000 check drawn on Sabine State Bank, to May 23, when he deposited a $65,000 money order in his Pelican

account to cover the check after Sabine had refused payment.

2. At the completion of trial, the trial judge charged the jury that petitioner could not be convicted unless the government proved beyond a reasonable doubt that he had committed each element of the offense charged against him (Tr. 308, 314). He emphasized that a separate crime or offense was alleged in each count of the three-count indictment, and that the evidence pertaining to each count should be considered separately (J.A. 36). The trial judge then summarized the prohibition of 18 U.S.C. 1014 as follows: "Whoever knowingly makes any false statement or report, or willfully over-values any * * * property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the [FDIC] * * * upon any application, advance, * * * commitment, or loan * * * shall be guilty of an offense * * *" (J.A. at 35-36). He further explained that the indictment alleged that petitioner violated the statute by engaging in check kiting, a "scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks" (*id.* at 36). He emphasized that check kiting "is not simply writing checks on a personal account, which may be temporarily overdrawn. Check kiting involves more than mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts, which, taken together, constitute a scheme built upon a series of false representations designed to give the defendant time and credit" (*ibid.*).

The trial judge instructed the jury that under Section 1014 the government must prove beyond a reasonable doubt that petitioner "knowingly and willfully [made] a false statement" to the bank, that this

false statement "concerned a material fact, that is, a fact which would influence the decision" of the bank, and the petitioner "made the false statement with fraudulent intent to influence the [bank] to extend credit" to him (J.A. 37). The judge added that a statement is "false" if it "relates to a material fact and is untrue and is then known to be untrue by the person making it" (*id.* at 38). In recognition of petitioner's defense that he lacked fraudulent intent, the court further instructed the jury that "the crucial question in check-kiting is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them. Hence, proof that the checks were eventually paid might well be pertinent to defendant's initial intent, that is, whether he intended to deceive the bank" (*ibid.*).

After instructing the jury, the trial judge asked counsel if there were any objections to the charge as delivered. Petitioner's attorney replied: "No, Your Honor" (Tr. 327). At the completion of its deliberations, the jury returned a verdict of guilty against petitioner on all three counts of the indictment.

3. The United States Court of Appeals for the Fifth Circuit unanimously affirmed petitioner's conviction, rejecting the contention that his check kiting scheme did not violate the provisions of 18 U.S.C. 1014.[5] After reviewing the literal statutory language

[5] The court of appeals also rejected petitioner's contention that the trial court erred in excluding certain evidence under Fed. R. Evid. 403. That contention, along with a claim that the trial court improperly instructed the jury, was renewed in the petition for certiorari in this Court (Pet. I). However,

of Section 1014, the court concluded that petitioner's argument that "Counts II and III of his indictment cannot fairly be deemed to set forth violations of this statute * * is simply without foundation" (Pet. App. A19). The court characterized the deceptive conduct alleged in Counts II and III as "classic incidents of check kiting" (*id.* at A20). Relying on its prior opinion in *United States* v. *Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980),[6] the court of appeals described "check kiting" as "a series of false representations" designed to obtain money or credit from a bank. Such conduct, the court concluded, clearly "violates § 1014" (Pet. App. A20).

SUMMARY OF ARGUMENT

18 U.S.C. 1014 clearly proscribes "check kiting" schemes of the kind practiced by petitioner. To be convicted under Section 1014, a defendant must know-

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on December 7, 1981, this Court limited its grant of certiorari to questions 3 and 4 presented in the petition, which deal solely with the scope of 18 U.S.C. 1014 (J.A. 40).

[6] In *United States* v. *Payne*, *supra*, 602 F.2d at 1217-1219, the Fifth Circuit rejected arguments identical to those presented by petitioner in this Court and held that 18 U.S.C. 1014 proscribes check kiting. The court concluded that a kited check constitutes a knowingly false statement made to a bank for the express purpose of obtaining a loan or advance of credit, within the plain language of Section 1014. The "meager" legislative history of the statute (602 F.2d at 1219) did not require a different result. On the contrary, "the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies. The statute therefore proscribes not only fraudulent statements given in connection with farm or construction loan[s] but 'all undertaking[s] which might subject the FDIC insured bank to risk of loss'" (*ibid.*, quoting *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978)).

ingly make a false statement, or willfully overvalue property or security, for the purpose of influencing the action of a federally insured financial institution with respect to an advance, commitment, or loan. Check kiting satisfies each of these elements.

In the typical check kiting scheme, a series of checks drawn on accounts with insufficient funds to cover the face value of the checks are systematically deposited in two or more banks, with the check kiter taking advantage of the time lag necessary to present the checks for payment to keep his "kite" afloat. A check utilized in a kiting scheme necessarily implies that the check kiter has sufficient funds on deposit to cover it, when in fact he does not, thus satisfying the "false statement" requirement of Section 1014. In addition, a kited check represents overvalued property or security because it purports to be supported by sufficient funds in the account on which it is drawn, when in fact it is not. Finally, the only purpose for kiting a check is to obtain interest-free use of the bank's funds during the life of the scheme. Thus, as a general matter, a check kiting scheme meets the requirement of Section 1014 that a false statement or overvaluation of security or property be made for the purpose of influencing a credit decision of a federally insured bank. The evidence at trial amply supported the jury's verdict that petitioner intentionally engaged in such a deceptive scheme in this case.

Nothing in the legislative history suggests that Section 1014 should be given a reading more restrictive than its plain terms permit. Although the statutes that preceded Section 1014 dealt principally with farm and homeowner loans, the addition of federally insured banks to Section 1014 in 1970 gave the sec-

tion additional breadth. Moreover, it is well established that the statute should not be narrowly construed to apply only to traditional loan transactions. *United States* v. *Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.), cert. denied, No. 80-2110 (Oct. 5, 1981); *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). Loan transactions of federally insured banks take countless forms, and there is no basis in the statute or its history for limiting its coverage to a subspecies of such transactions.

The legislative purpose behind Section 1014 is to "cover all undertakings which might subject the FDIC insured bank to risk of loss." *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. See also *United States* v. *Payne*, *supra*; *United States* v. *Pinto*, *supra*. The conclusion that Section 1014 covers check kiting schemes is necessary to give effect to Congress' broad purpose to protect the assets of federally insured financial institutions. See *United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 10-11; *Rubin* v. *United States*, 449 U.S. 424, 431 (1981). Petitioner's construction of Section 1014 "not only is cramped but conflicts with the plain meaning of the statute and its purpose as well" (*ibid.*). Indeed, it "would create a loophole in the statute that Congress simply did not intend to create" (*United States* v. *Naftalin*, 441 U.S. 768, 777 (1979)).

The other arguments presented by petitioner are likewise without merit. The "rule of lenity" only applies if there is a grievous ambiguity in the meaning of a statute. There is no such ambiguity in Section 1014. The statute, moreover, does not intrude upon the jurisdiction of the states or fundamentally

alter federal and state law enforcement responsibilities. To the contrary, it is most appropriate that federal authorities shoulder the burden of protecting federally insured financial institutions from fraudulent schemes.

Petitioner's claims that the indictment was insufficient and that Section 1014 improperly permits conviction without proof of specific intent to defraud are insubstantial. Petitioner's indictment closely tracked the language of Section 1014, and the evidence at trial plainly showed that petitioner was guilty of intentional misrepresentations to federally insured banks. Regardless of the mens rea requirements of other worthless check statutes, Congress is not precluded from proscribing intentional false statements and overvaluations of property or security made for the express purpose of influencing the credit decisions of federally insured banks.

ARGUMENT

PETITIONER'S "CHECK KITING" SCHEME FALLS WITHIN THE COVERAGE OF 18 U.S.C. 1014

"Check kiting" is the term commonly used to describe a scheme for obtaining credit by depositing a series of worthless checks in accounts maintained at different banks. Ordinarily, the scheme works as follows: The check kiter opens an account at Bank A with a nominal deposit. He then writes a check on that account for a large sum, such as $50,000. The check kiter then opens an account at Bank B and deposits the $50,000 check from Bank A in that account. At the time of deposit, the check is not supported by sufficient funds in the account at Bank A. However, Bank B, unaware of this fact, gives the check kiter immediate credit on his account at Bank

B. During the several-day period that the check on Bank A is being processed for collection from that bank, the check kiter writes a $50,000 check on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that check, Bank A gives the check kiter immediate credit on his account there, and on the basis of that grant of credit pays the original $50,000 check when it is presented for collection.

By repeating this scheme, or some variation of it, the check kiter can use the $50,000 credit originally given by Bank B as an interest-free loan for an extended period of time. In effect, the check kiter can take advantage of the several-day period required for the transmital, processing, and payment of checks from accounts in different banks, and, by manipulating the flow of checks into and out of his various accounts, can lead each bank to believe that his checks are supported by adequate funds at the time they are deposited. The banks, meanwhile, are deprived of the use of their funds. They also are exposed to serious losses if the check kiter decides to stop "covering" the checks. See *United States* v. *Young*, 618 F.2d 1281, 1284 n.2 (8th Cir.), cert. denied, 449 U.S. 844 (1980).[7] The evidence at trial showed that petitioner engaged in just such a scheme.

[7] The Federal Deposit Insurance Corporation, which insures the banks involved in this case, advises us that in 1980 it discovered 190 check kiting schemes practiced upon federally insured banks chartered under state law. These 190 incidents resulted in the extension of over $35,000,000 in interest-free credit to the participants in the check kiting schemes. In 1979, the FDIC uncovered 133 check kiting schemes; for 1978, the number was 162; for 1977, the number was 151; and for 1976, the number was 139. Check kiting cases constitute 8-9% of all apparent violations of the

The question presented in this case is whether petitioner's conduct constitutes a violation of 18 U.S.C. 1014, a comprehensive statute designed to protect the assets of federally insured lending institutions. Section 1014 makes it a criminal offense for anyone to "knowingly make[] any false statement or * * * willfully overvalue[] any * * * property, or security, for the purpose of influencing in any way the action of * * * any [federally insured] bank * * * upon any advance, * * * commitment or loan * * *." In order to establish a violation of this statute, the government must prove that the defendant knowingly made a false statement, or willfully overvalued property or security, for the purpose of influencing the bank's action in extending an advance, commitment, or loan.

As we demonstrate below, a check kiting scheme satisfies each of these elements. First, by depositing a check with a bank, the check kiter represents that he has on deposit funds equivalent to the face value of the check. Thus, as the facts of this case clearly show, the check kiter knowingly makes a "false statement" by depositing a check with full awareness that there are insufficient funds in the drawee bank to cover the check. Additionally, the check kiter "willfully overvalues" each of the checks deposited in furtherance of the scheme. Because the deposit of a check constitutes an implicit representation that it is supported by sufficient funds in the account on which

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criminal code involving FDIC insured state banks. The FDIC further reports that such schemes can lead to significant financial losses and represent a genuine threat to the solvency of some insured banks. The Federal Reserve Board has likewise reported one recent check kiting scheme that involved $9 million in worthless checks, and another that resulted in the insolvency of a federally insured institution.

it is drawn, the checks employed in a check kiting scheme are "overvalue[d]." Each check employed in the scheme, furthermore, constitutes both "property" and "security" within the meaning of the statute. Each check provides the basis for the bank's grant of a temporary extension of credit, and each is held by the bank as the means of recovering the funds that have been extended to the check kiter. Finally, the checks employed in a check kiting scheme are deposited for the purpose of obtaining immediate credit at the depositary bank. Such an extension of credit is a financial "advance," a "commitment," and a "loan." Thus, within the plain meaning of Section 1014, the checks employed in a check kiting scheme are false statements and overvalued property or security given "for the purpose of influencing * * * the action" of a bank "upon [an] advance, * * * commitment, or loan." 18 U.S.C. 1014.

A. The Plain Language of Section 1014 Establishes That The Statute Covers "Check Kiting"

As this Court frequently has stated, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, No. 80-808 (June 17, 1981), slip op. 3; *Rubin* v. *United States*, 449 U.S. 424, 429-431 n.8 (1981); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *United States* v. *Naftalin*, 441 U.S. 768, 772-774 (1979); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). In this case, the plain language of Section 1014 covers "check kiting" schemes of the type engaged in by petitioner,

and as we show below, nothing in the legislative history of the statute indicates that Congress intended to exclude such schemes from the coverage of the statute. Section 1014 therefore should be read to apply to "check kiting," just as it applies to other schemes to obtain credit from federally insured lending institutions by means of intentional misrepresentations.

Section 1014 is remarkable because "[t]he statutory language is sweeping" (*Lewis* v. *United States*, *supra*, 445 U.S. at 60), embracing numerous entities in which the federal government has a financial stake, and proscribing, in the disjunctive, various types of deceptive schemes that might be used to inflict injury on such entities. "Each succeeding prohibition is meant to cover additional kinds of illegalities * * * [for] the purpose of affording added safeguards" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 774). The objective of the statute is apparent from its language: it was designed to protect all types of federally insured lending institutions from losses stemming from false statements or misrepresentations by persons obtaining financial commitments, advances, or loans. The language of the statute makes it clear that it was intended to be broad in scope, broad enough "to maintain the vitality of the FDIC insurance program * * * and 'to cover all undertakings which might subject the FDIC insured bank to risk of loss.' " *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.), cert. denied, No. 80-2110 (Oct. 5, 1981), quoting from *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). See also *United States* v. *Bush*, 599 F.2d 72, 75, rehearing denied, 603 F.2d 860 (5th Cir. 1979).

Although most convictions under Section 1014 involve false representations made in connection with conventional loan applications, the language and the purposes of the statute are not so limited. *United States* v. *Pinto*, *supra*, 646 F.2d at 838 (terms of Section 1014 "should not be so narrowly construed as to apply solely to funds extended in a loan situation"). See *United States* v. *Sher*, 661 F.2d 34, 35 (3d Cir. 1981) (Adams, J., dissenting from denial of rehearing en banc). Rather, the statute refers broadly to "any" false statement or report, and to overvaluations of "any" property or security. The list of transactions to which the statute applies is equally expansive: it refers to "any application, advance, discount, purchase, agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." 18 U.S.C. 1014. "These words do not lend themselves to restrictive interpretation" (*United States* v. *Culbert*, 435 U.S. 371, 373 (1978)). If Section 1014 applied solely to a particular type of formal loan transaction, the extended list of covered transactions prescribed by Congress "would be rendered meaningless" (*United States* v. *Pinto*, *supra*, 646 F.2d at 838).

Thus, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage" (*United States* v. *Culbert*, *supra*, 435 U.S. at 373) to a particular kind of transaction; rather, Congress sought to legislate broadly, in order to address a general problem. A transaction such as "check kiting," therefore, which threatens the assets of federally insured banks in exactly the same way as a misrepresentation in an application for a loan, should not

be excluded from the reach of the statute simply because the broad generic terms of the statute do not identify check kiting by name or precise description. It is enough that check kiting falls within the literal language of the statute and creates the kind of economic risk that Congress meant to prevent. As we demonstrate in more detail below, "check kiting" schemes satisfy each element of a Section 1014 violation.

1. *A kited check embodies an intentional "false statement" within the meaning of Section 1014*

Section 1014 proscribes "any false statement" that is "knowingly" made for the purpose of influencing the action of a federally insured financial institution. Since a check kiting scheme involves the systematic writing and depositing of checks for which there are insufficient funds, a kited check plainly qualifies as an intentional "false statement" within the clear language of Section 1014.

The sweep of the "false statement" requirement of Section 1014, as is true of the other elements of the statute, is extremely broad: "any" false statement is proscribed. The courts, furthermore, have construed the provision to cover not only oral and written representations, but even failure to disclose material information needed to avoid deception.[8]

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[8] The fact that petitioner may not have made "any oral or written statement or representation" (Pet. Br. 5) at the time the checks were deposited is immaterial; the checks themselves constitute "false statements" within the meaning of Section 1014. Indeed, failure to make any statement revealing the truth, after presenting a worthless check made out in a large dollar amount, only serves to compound the deception.

United States v. *Sackett*, 598 F.2d 739, 741-742 (2d Cir. 1979) ("false statement" applies to both written and oral statements); *United States* v. *Greene*, 578 F.2d 648, 657 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (failure to disclose that equipment was subject to a lien constitutes a false statement). The typical check kiting scheme, therefore, clearly involves an intentional false statement: the check kiter represents, upon presenting the kited check, that he has sufficient funds on deposit to cover the check when in fact such funds are nonexistent. *United States* v. *Payne*, *supra*, 602 F.2d at 1218. As the facts at trial established, petitioner presented worthless checks in large face amounts without disclosure or warning. In this factual context, the jury could reasonably find that petitioner made an intentional misrepresentation with the intent to influence the bank.

Petitioner asserts (Pet. Br. 37-39), and one district court has agreed (*United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978)), that a kited check cannot constitute a false statement because it merely represents a contractual obligation of the drawer to pay a sum certain, which can be neither true nor false. But while there is no doubt that a check embodies a contractual obligation of the drawer to pay a sum certain, presentation of a check to a bank—without any contrary disclosure or warning—necessarily includes a representation that the drawer currently has funds on deposit sufficient to cover the face value of the check. A check is accepted with the expectation that it will be paid in the normal course of collection; a banker who realized that the drawer had no funds on deposit would not credit the check to the drawer's account or reduce it to cash.[9] A

[9] Petitioner's argument that his checks did not embody a statement that he had at least the face amount of the checks

"representation or statement as to the value of [a] check[]" is one of the "necessary implications" of writing the document. *United States* v. *Payne, supra,* 602 F.2d at 1218. Indeed, even petitioner concedes (Pet. Br. 28-29) that prosecutions under state bad check laws do not rest upon the defendant's breach of a contractual "promise * * * that the check [will] be paid upon due presentment," but upon the fact that in presenting a bad check the defendant has been "guilty of such fraud and misrepresentation as to be punishable as a crime * * *" (Pet. Br. 28-29 n.17 (emphasis omitted), quoting F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965)).[10] Regardless of any contractual breach involved in check kiting, and indeed in spite of the fact that the kited

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on deposit is contrary to the common understanding of the hundreds of thousands of persons who each day accept checks (often drawn on out-of-state banks) as payment for goods, services, or some other obligation. In common usage, the *check itself* is considered payment, notwithstanding the more technical view that it is merely a promise to pay if the check is dishonored. Moreover, the trial judge here instructed the jury that it could not convict unless it believed petitioner had made misrepresentations with an intent to deceive (J.A. 37-38). The jury found against petitioner on that factual issue.

[10] Petitioner apparently assumes that although a check may constitute a misrepresentation of fact under state law, it cannot be a "false statement" under federal law (Pet. Br. 28-29 & n.17). If, however, a kited check constitutes fraud or misrepresentation under state law, it most certainly falls within the unambiguous sweep of a federal statute proscribing "any false statement." Moreover, the fact that a 1965 legal treatise did not cite Section 1014 in its discussion of false statements and bad checks is of no help to petitioner (Pet. Br. 28-29 & n.17). Section 1014 did not generally extend to federally insured banks until 1970 (Pub. L. No. 91-609, Title IX Section 915, 84 Stat. 1815).

checks may eventually be paid,[11] a person who writes a series of checks knowing that there are no funds on deposit to cover them has made intentional false representations within the reach of Section 1014.

2. *A kited check is "willfully overvalue[d]" "property" or "security" within the meaning of Section 1014*

As we have demonstrated above, petitioner violated Section 1014 because he intentionally made a misrepresentation to a federally insured bank for the purpose of obtaining credit. In addition to this, however, petitioner violated the statute for a separate and independent reason. As the facts of this case show, petitioner "willfully overvalue[d]" "property" or "security" presented to the bank in order to obtain credit. Since the statute is worded in the disjunctive, this is a separate basis for imposing liability in a check kiting case.

In the typical check kiting scheme, the check that is deposited in order to obtain immediate credit is in fact worthless or nearly worthless. As the depositor realizes, the check is supported by only minimal funds in the account on which it is drawn. Thus, while the checks involved in this case were drawn in face amounts exceeding $50,000, they were in fact worthless, or nearly so, as petitioner well knew.

The reason that a check kiting scheme works, as the check kiter knows, is that the bank in which the check is deposited regards the check as an implicit representation that it is supported by adequate funds

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[11] See *United States* v. *Foshee*, 578 F.2d 629, 631 (5th Cir. 1978) (reimbursement or restitution does not "absolve[] one from the crime of check kiting" in a prosecution under the federal mail fraud statute, 18 U.S.C. 1341).

in the account on which it is drawn. See *United States* v. *Payne*, *supra*, 602 F.2d at 1217; *United States* v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc); F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965) ("In giving a check, the drawer impliedly represents that he has on deposit with the drawee bank funds equivalent to the face amount of the check"). It is essential to the success of the scheme that the bank accept this representation; if the bank questions it and inquires into the status of the account on which the check is drawn, the scheme will collapse. It would be more prudent, of course, for a bank to make such an inquiry when large checks are involved, just as it would be prudent for banks to inquire more carefully into the accuracy of representations made about the value of collateral pledged as security for conventional loans. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431. However, such an inquiry is by no means a necessary predicate for prosecution under Section 1014, which places the burden of avoiding false representations on the person who seeks the funds of the federally insured bank. The customer is meant to be dissuaded from making "any" false representation, and from "willfully overval[uing]" any security or property to obtain use of the bank's funds. A kited check is "willfully overvalued," within the meaning of the statute, just as worthless securities that are presented as collateral for a loan are "willfully overvalued." See *United States* v. *Calandrella*, 605 F.2d 236 (6th Cir.), cert. denied, 444 U.S. 991 (1979).

Section 1014 applies to the willful overvaluation of "any land, property, or security." Again, this element of the statute is cast in broad, rather than restrictive terms. Congress plainly intended to pro-

scribe the willful overvaluation of any thing of value given to a lending institution. There is no suggestion that the broad generic terms "any * * * property or security" were meant to exclude items such as checks presented to obtain a temporary extension of credit. Petitioner argues strenuously that the statute must be interpreted to exclude checks. But, as this Court stated in another context, "[t]he short answer is that Congress did not write the statute that way" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 773). Moreover, it is entirely consistent with the purpose of the statute to read this terminology to include checks submitted for such a purpose.

Section 1014 applies, by its literal terms, to "any" species of "property." Giving that term its "ordinary, contemporary, common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), it is plain that it applies to checks with a face value of over $50,000.[12] As petitioner is quick to point out (Pet. Br. 37-39), a check is a demand to a drawee to pay a sum certain of money, which is backed by a promise of the drawer to make payment in the event of default. And, in ordinary business affairs, checks are treated as the functional equivalent of money. Thus, a check is plainly a kind of "property," and Section 1014 is broad enough to encompass overvalued checks presented to federally insured banks to obtain credit. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 340 (1979) ("money" is a form of "property").

Beyond this, Section 1014 applies, by its literal terms, to "any" species of "security." While the term "security" is not defined in Section 1014, it is

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[12] Property is synonymous with "wealth" or "a valuable right." *Webster's Third New International Dictionary* 1818 (1976 ed.).

defined in other sections of Title 18, where it is uniformly understood to include checks. For example, in the National Stolen Property Act, 18 U.S.C. 2311 *et seq.*, the term "security" is specifically defined to include "any * * * check." 18 U.S.C. 2311. Likewise, in the general definitional portion of Title 18, the term "obligation or other security of the United States" is defined to include "all * * * checks, or drafts for money." 18 U.S.C. 8.[13] The definition of "security" that is consistently employed in Title 18 refers to items that represent some other thing of value. Under this definition, a check clearly qualifies as a "security."[14]

Moreover, it is clear that when a bank extends credit on the basis of a deposited but uncollected check, it gains a "security interest" in the check,

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[13] Although the definition contained in 18 U.S.C. 8 applies to the term "obligation" as well as "security," the section makes it clear that the drafters regarded an obligation as simply one kind of security, *i.e.*, a subset of the more general category of "securities." See also 18 U.S.C. 471-474 (using the term "obligation or other security"); 18 U.S.C. 335 (referring to "check, draft or other security"); 18 U.S.C. 955 (referring to "bonds, securities, or other obligations").

[14] Petitioner suggests in passing that the term "security" in Section 1014 should be defined as it is in the Securities Act of 1933 and the Securities Exchange Act of 1934 (Pet. Br. 31-32). This assertion is without merit. Those statutes serve purposes that are, in substantial measure, distinct from criminal laws focusing on fraudulent banking practices. They deal in the main with investment transactions, and contain their own definitions of the term "security". See the brief for the Securities and Exchange Commission as amicus curiae in *Marine Bank* v. *Weaver*, No. 80-1562 (argued Jan. 11, 1982). Because Section 1014 deals solely with banking frauds rather than investment frauds, the definitions of "security" contained in the federal securities laws do not control here.

which secures the extension of credit until such time as the check is collected. The Uniform Commercial Code makes this point explicitly. Section 208 of Article 4 of the U.C.C. (1952 version) provides:

> (1) A bank has a security interest in an item [including a bank check] * * *
>
> (a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;
>
> (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge back; or
>
> (c) if it makes an advance on or against an item.
>
> * * * * *
>
> (3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item * * *. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item * * * for purposes other than collection, the security interest continues and is subject to the provisions of Article 9 except that
>
> (a) no security agreement is necessary to make the security interest enforceable * * *.

The only significant change made in this provision by Louisiana law is the substitution of the word "lien" for "security interest" (La. Rev. Stat. Ann. § 10:4-208 (West Cum. Supp. 1980)), which was done not to change the substantive content of the statute but rather to avoid "reference to Article 9 [U.C.C.]

concepts that have not been adopted in Louisiana" (*id.* at comment).[15]

Although petitioner implies otherwise (Pet. Br. 32), regardless of whether the banks in this case had a "security interest" or a "lien" on the kited checks, the checks were still held as security for the credit that was extended upon deposit of the documents.[16] Thus, using either the definition of "security" prescribed by Congress in Title 18, or the definition of "security" ordinarily used in commercial law, the term "security" contained in Section 1014 includes a check that is deposited in order to obtain an immediate extension of credit.

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[15] La. Rev. Stat. Ann. § 10:4-208 (West Cum. Supp. 1980) provides, in pertinent part:

> A bank has a lien on an item * * *
>
> (a) in the case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;
>
> (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or
>
> (c) if it makes an advance on or against an item.
>
> * * * * *
>
> (3) Receipt by a collecting bank of a final settlement for an item is a realization on its lien on the item * * *. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the lien continues except that
>
> (a) no agreement is necessary to make the lien enforceable * * *.

[16] See *Webster's Third New International Dictionary* 2054 (1976 ed.), defining "security" to include "property given or serving to make secure the enjoyment or enforcement of a right."

3. *A kited check is used "for the purpose of influencing" the action of a bank upon an "advance, commitment, or loan"*

The final element of Section 1014 is likewise satisfied in a check kiting case. The whole purpose of the scheme is to obtain an immediate extension of credit, and to do so by depositing a check that purports to be supported by adequate funds at the drawee bank. The bank that extends funds on the basis of the deposited but not yet collected check clearly makes an "advance," a "commitment," and a "loan" within the ordinary meaning of those terms. See *United States* v. *Western Contracting Corp.*, 341 F.2d 383, 386 (8th Cir. 1965) (an advance); *Universal C.I.T. Corp.* v. *Guaranty Bank & Trust Co.*, 161 F. Supp. 790, 793 (D. Mass. 1958) (a loan); *Falconi* v. *FDIC*, 257 F.2d 287, 289 (3d Cir. 1958) (credit); *United States* v. *Street*, 529 F.2d 226 (6th Cir. 1976) (check kiting is the obtaining of "forced credit"). J. White & R. Summers, *Uniform Commercial Code* 558 (2d ed. 1980); F. Whitney, *supra*, § 310, at 449; U.C.C. § 4-208 (1952 version). See also *United States* v. *Stoddart*, *supra*, 574 F.2d at 1051-1053 (extension of credit based on defendant's statement that a deposit had not been credited to his account constitutes a "commitment" under Section 1014).[17]

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[17] The ordinary meaning of the words used by Congress plainly applies to the facts of this case. *Webster's Third New International Dictionary* 30 (1976 ed.) defines the term "advance" to include "money or other value" given "in expectation of repayment or other future adjustment." "Loan" includes "money" "lent for the borrower's temporary use" or "the grant or temporary use made by a lender" (*id.* at 1326). The word "commitment" is broader still, embracing any "engagement" to "assume a financial obligation" (*id.* at 457).

Petitioner's argument on this point (Pet. Br. 14-24) misses the mark. He contends that check kiting is not within the reach of Section 1014 because the statute focuses upon loans and extensions of credit. We agree that extensions of credit are the main (although not exclusive) target of the statute. Our point, however, is that check kiting is covered by the statute for the simple and sufficient reason that it, like a loan, results in an extension of credit. If a worthless check is submitted to a bank for reasons other than to obtain an extension of credit, the conduct is simply not check kiting in the ordinary sense of the term, and would not fall within the prohibition of Section 1014. However, if a properly instructed jury concludes that a worthless check was submitted in order to obtain immediate credit from a bank, there is no reason, even under petitioner's construction of the statute, to regard the conduct as falling outside the reach of Section 1014.[18] Petitioner maintains that the statute cannot be applied to schemes to obtain temporary use of funds by check kiting, but as this Court said

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[18] The jury in this case was properly instructed that it could convict petitioner only if it found beyond a reasonable doubt that he had deposited checks "for the purpose of influencing" the Pelican State and Winn State Banks in extending an "advance, * * * commitment, or loan." 18 U.S.C. 1014. The court emphasized that petitioner could not be found culpable for "simply writing checks on a personal account, which may be temporarily overdrawn." J.A. 36. The jury could find a violation of Section 1014 only if it concluded that petitioner had undertaken "a series of false representations designed to give [himself] time and credit." *Ibid.* Specifically, a violation of Section 1014 could be established only if the jury found petitioner had deposited the checks in question with an "intent to influence the [Pelican State and Winn State Banks] to extend credit to [petitioner]." J.A. 37, 38.

in interpreting another federal criminal statute, "[n]othing on the face of the statute supports this reading of it" (*United States* v. *Naftalin*, *supra*, 441 U.S. at 772). Indeed, it is fair to say here, as in *Naftalin*, that petitioner's construction "would create a loophole in the statute that Congress did not intend to create" (*id.* at 777).

For these reasons, we submit that the petitioner's check kiting scheme falls within the plain language of Section 1014. Accordingly, unless there is something in the legislative history of the statute that clearly indicates an intention to exclude schemes such as check kiting from the coverage of the statute, Section 1014 should not be read to bar prosecution for such schemes. As we demonstrate below, the legislative history does not suggest that the literal language of the statute should be narrowly construed, or that check-kiting should be exempted from its coverage. Quite to the contrary, the legislative history shows that the statute was designed to provide broad protection to federally insured lending institutions against misrepresentations made in the course of transactions in which the assets of such institutions are placed at risk. That broad protective purpose directly supports the literal interpretation of the statute adopted by the court below.

B. Nothing in Section 1014's Legislative History Evidences a Clear Congressional Intent to Exclude Check Kiting from the Coverage of the Statute

The unambiguous language of Section 1014 clearly proscribes conduct commonly referred to as "check kiting." When statutory language is clear, "judicial inquiry is complete, except in 'rare and exceptional circumstances' ". *Rubin* v. *United States*, *supra*, 449 U.S. at 430. See *United States* v. *Turkette*, No.

80-808 (June 17, 1981), slip op. 3, quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[I]n the absence of 'a clearly expressed legislative intent to the contrary, [unambiguous] language must ordinarily be regarded as conclusive' "). Petitioner has pointed to no clearly expressed legislative desire to exclude check kiting from the reach of Section 1014.

As petitioner states in his brief (Pet. Br. 14-22), Section 1014 is a composite of various statutes dealing with specific lending institutions. The language ultimately adopted in the statute, however, "does not occur in any one of the original sections." Section 1014 is "a composite of terms and transactions mentioned in each." 18 U.S.C. 1014 (Historical and Revision Notes). Moreover, while the original statutes combined in Section 1014 may have focused primarily on loan transactions involving farmers and homeowners (Pet. Br. 15-16), federal courts uniformly have recognized that the language of the statute goes beyond these transactions. See, e.g., *United States* v. *Sabatino*, 485 F.2d 540, 543-544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974) (the literal terms of the statute apply to automobile loans); *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053 (Section 1014 is not confined to traditional loan transactions; an extension of credit based upon a claimed deposit of a check is a covered "commitment" under the statute). Since 1970, Section 1014 has specifically applied to all federally insured banks. Pub. L. No. 91-609, Title IX, Section 915, 84 Stat. 1815. If Congress had intended to limit the protection of Section 1014 solely to traditional loan transactions of such banks, it certainly would have described the covered transactions with language less expansive than "any application,

advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same * * *." 18 U.S.C. 1014. See *United States* v. *Turkette, supra,* slip op. 4.[19]

Petitioner has pointed to no relevant legislative history that evidences a congressional desire to limit the common meaning of the words used in Section 1014.[20]

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[19] This Court should "decline the invitation to limit the statute's scope by reference to an undefined category" (*United States* v. *Culbert, supra,* 435 U.S. at 380)—such as "commercial and personal loan or credit transactions" (Pet. Br. 23). Such a gloss would introduce serious ambiguity in the statute, since its contours could only be guessed. See *Culbert, supra,* 435 U.S. at 374.

[20] Petitioner relies on a statement in the legislative history referring to the addition in 1964 of federal credit unions to Section 1014. During the debate on that amendment, the sponsor stated that the amendment "broadens existing law only to the extent of adding [credit unions] to the statute." 109 Cong. Rec. 24791-24792 (1963). That statement, however, is largely irrelevant in determining the current scope of Section 1014. Check kiting could not have been prosecuted under the statute in 1964 because banks providing general checking services were not added to Section 1014 until 1970. Pub. L. No. 91-609, Title IX, Section 915, 84 Stat. 1815. Furthermore, while the addition of credit unions in 1964 may not have extended the reach of Section 1014 beyond the realm of traditional loan transactions, the addition of federally insured banks in 1970, with their wide range of commercial activities, gave significantly broader scope to the language of Section 1014. See *United States* v. *Payne, supra,* 602 F.2d at 1219. There is no evidence that Congress in 1970 believed that addition of federally insured banks broadened existing law "only to the extent of adding them to the statute" (Pet. Br. 22, quoting 109 Cong. Record 24791-24792 (1963)). Federally insured banks are protected under Section 1014 from deceptive schemes respecting any "loan", "commitment" or "advance" that occur in the course of their commercial banking functions.

On the contrary, there are several statements in the legislative history that evidence a congressional intent to give the terms of Section 1014 a comprehensive scope. Thus, the statute is not "limited by its terms to borrowers and would seem also to apply to others" (S. Rep. No. 1078, 88th Cong., 2d Sess. 4 (1964)). It is designed to provide "penalties for making false statements or reports in connection with loans *or other similar transactions.*" H.R. Rep. No. 91-1556, 91st Cong., 2d Sess 35 (1970) (emphasis added); H.R. Rep. No. 91-1784, 91st Cong., 2d Sess. 66 (1970) (emphasis added). Certainly a check kiting scheme, in which repeated false representations are made to a bank in order to obtain the use of its funds, is similar to a transaction in which a loan is obtained by means of false statements or reports.[21]

In short, a review of the legislative history of Section 1014 reveals no legislative intent to confine the statute to a particular form of credit transaction. "The purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss." *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. See also *United States* v. *Pinto*, *supra*, 646 F.2d at 838. With no clear indication that Congress sought to exclude check kiting from the reach of Section 1014, this Court should afford the language of the statute its full scope and thereby

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[21] Of course, it is completely irrelevant that "check kiting" was not mentioned by name during the legislative debates. Countless credit transactions went without specific mention, but undoubtedly are covered by the generic language of the statute. See *Barr* v. *United States*, 324 U.S. 83, 90 (1945): "if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."

give effect to Congress' broad protective purposes. See *United States* v. *Naftalin*, *supra*, 441 U.S. at 772-778; *Rubin* v. *United States*, *supra*, 449 U.S. at 429-431.[22]

A holding that Section 1014 reaches check kiting does not produce an absurd result, render the statute internally contradictory, or diverge from legislative policy. To the contrary, Congress' policy, manifest in Section 1014 and elsewhere throughout Title 18 of

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[22] The cases relied upon by petitioner to support his legislative intent argument (Pet. Br. 24) proceed on a faulty premise. *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa.), aff'd, 657 F.2d 28 (3d Cir. 1981), petition for cert. pending, No. 81-1047; *United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978); *United States* v. *Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). Instead of first examining the language of the statute and then looking to the legislative history to see if Congress clearly intended a narrower construction, these courts looked to the legislative history for affirmative indications of congressional intent to include check kiting within Section 1014. They apparently believed that, absent explicit mention of check kiting in the debates, Congress simply could not have meant to include check kiting within the broad reach of Section 1014. The court in *Sher*, for example, stated that while the legislative history of Section 1014 was "scant," it found "nothing in it indicating that § 1014 was meant to include check-kiting in its prohibition." *United States* v. *Sher*, *supra*, 505 F. Supp. at 861. This Court has left no room to doubt that this method of construing a statute is improper. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). This Court repeatedly has rejected arguments that "would permit an omission in the legislative history to nullify the plain meaning of a statute." *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980).

the United States Code, is that federal criminal sanctions are necessary to provide federally insured banking institutions with comprehensive protection against practices that cause risk of loss.[23] *United States* v. *Turkette*, *supra*, slip op. at 10-11; *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 108. Petitioner's construction of Section 1014, on the other hand, would result in a large loophole in the protection afforded these institutions. A bank's protection against false statements intended to influence credit transactions would depend not upon whether the misrepresentations had been made in connection with a loan, advance, or commitment, but rather upon whether a court concluded that the transaction was "traditional" or found that Congress had listed the transaction by name in a committee report.[24] Thus, far from conflicting with the legislative

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[23] Congress has enacted many criminal statutes that safeguard the integrity of federally insured financial institutions. Proscription of check kiting activities injurious to federally insured institutions is fully consistent with that scheme. See 18 U.S.C. 212 (offering loans or gratuities to bank examiners by bank officials); 18 U.S.C. 213 (accepting loans or gratuities from bank officials by bank examiners); 18 U.S.C. 493 (forging, counterfeiting, or passing, bonds and obligations); 18 U.S.C. 655 (theft from banks by bank examiners); 18 U.S.C. 656 (theft, embezzlement or misapplication from banks by officers or employees); 18 U.S.C. 709 (false advertising of claims that bank deposits are insured by FDIC); 18 U.S.C. 1005 (unauthorized issuance of notes, certificates of deposit, etc.); 18 U.S.C. 1006 (falsification of records by FDIC officials); 18 U.S.C. 1007 (false or misleading statements to the FDIC); 18 U.S.C. 1906 (disclosure of confidential information from bank examination reports); 18 U.S.C. 2113 (bank robbery and associated crimes).

[24] Modern money-center commercial banks make financial commitments, advances, and loans in countless forms. And, as

intent behind Section 1014, the court of appeals' conclusion that the statute proscribes check kiting activity furthers the legislative purpose to maintain the integrity of federally insured banking institutions. *United States* v. *Bush*, *supra*, 599 F.2d at 75.

C. The Other Arguments Advanced by Petitioner Do Not Require Reversal of His Conviction

Interspersed throughout his general contentions regarding the scope of Section 1014, petitioner has presented arguments that his conviction must be reversed because of the "rule of lenity", because giving Section 1014 a literal reading would produce an undue intrusion into the jurisdiction of state law enforcement officers, and because the indictment was inadequate to charge check kiting or a violation of Section 1014. These miscellaneous contentions are without merit.[25]

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commercial banking practices evolve, those forms likewise evolve. See, *e.g.*, E. Reed, R. Cotter, E. Gill & R. Smith, *Commercial Banking* 196-310 (1976). Restriction of the statute to "traditional" lending practices would result in serious ambiguities and would defeat the protective purposes of Congress. Congress adopted broad generic language to avoid such artificial restrictions, and to avoid the need to set forth a lengthy catalogue of protected transactions.

[25] Petitioner also asserts that, if this Court reverses his conviction under Section 1014, it also should remand the case for a new trial on the charges brought against him under 18 U.S.C. 656 (Pet. Br. 4 n.3, 40). This argument, resting solely on the claim that evidence of "check kiting" unduly prejudiced petitioner's trial on the count alleging misapplication of bank funds, is totally without merit. Petitioner's conviction under 18 U.S.C. 656 rested on his misuse of Pelican State Bank's "dummy account" between December 20, 1977 and May 9, 1978 (Pet. App. A7-A8). Petitioner's check kiting

1. The rule of lenity is merely "a[] guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), which is not applicable unless there is such a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Moreover, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Calla-*

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activities, though related to his use of the "dummy account," took place at a later time (Pet. App. A8-A9). The jury, furthermore, was repeatedly instructed that each count of the indictment alleged a discrete offense, and that it was required to consider separately the evidence applicable to each count (J.A. 36):

> Remember a separate crime of [sic] offense is charged in Counts II and III. You should consider the evidence pertaining to each count separately. The offense charged in each count is completed only after each of the essential elements you are about to hear is proven beyond a reasonable doubt. If the Government fails to prove any element of the offense charged in that count then the defendant must be acquitted as to that count.

See also Tr. 314-315. The jury is presumed to be able to follow instructions of this kind. See *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) ("the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform").

nan v. *United States*, *supra*, 364 U.S. at 596. As the Court observed in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, e.g., *United States* v. *Naftalin*, 441 U.S. 768, 778-779 (1979); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975); *id.* at 795 (Douglas, J., dissenting); *id.* at 798 (Brennan, J., dissenting).

Contrary to the repeated suggestions of petitioner (Pet. Br. 23, 31-32), there is no ambiguity in Section 1014 that requires this Court to read the statute "more restrictively than its language would permit." *United States* v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc). The evident statutory purpose of Section 1014 is to protect all federally insured lending institutions from losses arising out of false statements or misrepresentations made by persons doing business with them. *United States* v. *Pinto*, *supra*, 646 F.2d at 838; *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. A check kiting scheme intended to "result in the advance of credit," which involves representations that "checks presented for deposit are supported by adequate funds" when such "representations are false," falls within the plain language of Section 1014.

United States v. *Sher*, *supra*, 661 F.2d at 35 (Adams, J., dissenting from denial of rehearing en banc). Since, as noted above, there is no basis in the legislative history of Section 1014 to argue that check kiting schemes were *not* intended to be covered by the statute, the rule of lenity does not require this Court to read the statute restrictively. *United States* v. *Turkette*, *supra*, slip op. 11 n.10.

2. Petitioner's contention that an unrestricted reading of Section 1014 results in "a major expansion of federal criminal jurisdiction" (Pet. Br. 27) and a serious intrusion "upon notions of judicial comity" (*id.* at 29) is completely without merit. Construction of a statute in light of the federal-state balance "only appl[ies] 'when we are uncertain about the statute's meaning.' " *United States* v. *Culbert*, *supra*, 435 U.S. at 379, quoting *Scarborough* v. *United States*, *supra*, 431 U.S. at 577. Such considerations are inappropriate where, as here, the conduct at issue (check kiting) falls within the scope of clear statutory language and application of the statute to that conduct furthers the legislative purpose behind the statute. See *United States* v. *Culbert*, *supra*, 435 U.S. at 379. Furthermore, even assuming that federalism concerns are relevant to the construction of Section 1014, those concerns are clearly insubstantial in the context of this case. The federal government, which provides deposit insurance, has a paramount interest in safeguarding the financial integrity of federally insured banking institutions. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431 n.8; *Perrin* v. *United States*, *supra*, 444 U.S. at 49-50. Moreover, check kiting already is subject to prosecution in federal courts under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. See, e.g., *United States* v. *Giordano*, 489 F.2d 327 (2d Cir. 1973); *United*

States v. *Constant*, 501 F.2d 1284 (5th Cir. 1974), cert. denied, 420 U.S. 910 (1975); *United States* v. *Hendrickson*, 394 F.2d 807 (6th Cir. 1968), cert. denied, 393 U.S. 1031 (1969); *United States* v. *Strauss*, 452 F.2d 375 (7th Cir. 1971), cert. denied, 405 U.S. 989 (1972); *United States* v. *Young*, 618 F.2d 1281 (8th Cir.), cert. denied, 449 U.S. 844 (1980); *United States* v. *Gross*, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970). A check kiting prosecution under Section 1014, which by its terms applies only to federally insured financial institutions, therefore results in no new inroad upon state criminal jurisdiction.[26]

3. Petitioner also argues that the indictment was inadequate to charge him either with a violation of Section 1014 (Pet Br. 33) or check kiting in general (*id.* at 13, 35-37). These contentions are insubstantial.

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[26] As noted above, Congress has provided comprehensive criminal sanctions to protect federally insured financial institutions. See note 23, *supra*. The protection against check kiting afforded by Section 1014 is consistent with this scheme —Congress has sought to fully protect the integrity of the federal insurance program. *United States* v. *Bush*, *supra*, 599 F.2d at 75; *United States* v. *Pinto*, *supra*, 646 F.2d at 838; *United States* v. *Stoddart*, *supra*, 574 F.2d at 1053. Thus, our construction of Section 1014 does not displace the authority of the states. Rather, it complements state law enforcement in an area where the federal interest is substantial. See *United States* v. *Turkette*, *supra*, slip op. 9 n.9: "The states remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute [violations of Section 1014] is no restriction on the separate administration of criminal justice by the states."

The two counts of the indictment charging petitioner with violations of Section 1014 closely track the language of the statute and clearly apprise petitioner of the provisions of federal law that he violated. It is well settled that an indictment which tracks the language of the statute, advises the defendant of the elements of the offense and the nature of the charges against him, and allows him to plead a conviction or acquittal as a bar to subsequent prosecution, is sufficient to withstand attack. *United States* v. *Bailey*, 444 U.S. 394, 414 (1980); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *United States* v. *Young*, *supra*, 618 F.2d at 1286; *United States* v. *Fleming*, 526 F.2d 191, 192 (8th Cir. 1975), cert. dismissed, 423 U.S. 1028 (1976); *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). Petitioner cannot seriously contend that Counts II and III of his indictment fail to meet these requirements.[27]

Petitioner asserts (Pet. Br. 13) that notwithstanding the sufficiency of the indictment under Section 1014, he cannot properly be convicted of check kiting because the indictment nowhere uses the term "check kiting." The indictment, however, clearly outlines the underlying facts that constitute "check kiting." It is immaterial that the scheme is not labelled in the fashion that petitioner suggests. Counts II and III of the indictment allege that petitioner presented checks for deposit with the implicit representation "that said check[s] [were] of a value equal to the face amount of the check[s], when in truth and fact as [petitioner] then well knew, there were no sufficient funds" to cover the checks. It is further alleged

[27] See note 2, *supra*.

that this was done "for the purpose of influencing" the respective banks "upon an advance of money and extension of credit" (J.A. 3-4). These allegations are clearly descriptive of check kiting, "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks." *Falconi* v. *FDIC*, 257 F.2d 287, 289 (3d Cir. 1958). It would indeed be a strange result for this indictment to be held insufficient because, while it described the elements of petitioner's crime under 18 U.S.C. 1014, it failed to attach a colloquial label—"check kiting"—to the offense. See, *e.g.*, *Russell* v. *United States*, *supra*, 369 U.S. at 763 ("[c]onvictions are no longer reversed because of minor and technical deficiencies [in the charging papers] which did not prejudice the accused," quoting *Smith* v. *United States*, 360 U.S. 1, 9 (1959)).

A related argument advanced by petitioner is that Section 1014 is an improper vehicle to prosecute check kiting because it permits conviction without proof of an intent to defraud (Pet. Br. 35-37). This argument seriously misconstrues the question before the Court. The question to be decided is not whether "check kiting" requires an intent to defraud in order to be culpable, but rather whether "check kiting" of the type practiced by petitioner falls within the reach of a statute prohibiting intentional misrepresentations made for the purpose of influencing a federally insured bank to extend a loan, commitment, or advance. Whatever the requirements of other bad check or fraud statutes, "check kiting" of the kind practiced by petitioner is clearly within the unambiguous scope of Section 1014.

Section 1014, moreover, is not, as petitioner asserts (Pet. Br. 36), "virtually a strict liability statute."

While Section 1014 does not require that a protected financial institution rely to its detriment on a false statement or willfull overvaluation, or that a defendant actually intend to defraud the institution by causing economic loss (*United States* v. *Sabatino*, 485 F.2d 540, 544-545 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974)),[28] it does include a mens rea requirement (*ibid.*). The defendant must be guilty of intentional, culpable conduct to be convicted under Section 1014. The statute requires the government to prove that the defendant made a knowingly false statement or willfully overvalued property or security for the express purpose of influencing the action of a federally insured financial institution upon an advance, commitment or loan. *Ibid.* In a check kiting prosecution under Section 1014, the government must show that the defendant presented an intentionally overvalued check for the purpose of obtaining an extension of credit.[29] This conduct, which the Fifth Circuit has called "[t]he essence of check kiting" (*United States* v. *Payne*, *supra*, 602 F.2d at 1218), exposes financial institutions to a serious risk of loss and properly falls within the scope of Section 1014.[30]

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[28] Since the gravamen of the offense under Section 1014 is merely the defendant's intent *to influence* a bank or lending institution, whether or not the institution actually relies on a misrepresentation or whether the defendant carries the misrepresentation to the point of actually defrauding the institution is completely irrelevant. *United States* v. *Sabatino*, *supra*, 485 F.2d at 544-545.

[29] The trial judge in this case repeatedly charged the jury that petitioner could not be convicted unless he acted with an intent "to deceive the bank", and that the government must prove that he "knowingly and willfully [made] a false statement of a material fact" (J.A. 37, 38).

[30] See note 7, *supra*.

There may indeed be other statutes prohibiting "check kiting" that require additional or perhaps even stricter elements of proof (Pet. Br. 37), but that does not disable Congress from prescribing its own standards under Section 1014. See *Rubin* v. *United States*, *supra*, 449 U.S. at 431 n.8.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 80-2116

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Petitioner has brought to the Court's attention the recent decision of the Second Circuit in *United States* v. *Krown*, No. 81-1192 (Apr. 1, 1982), and has filed a supplemental brief that argues that the decision supports contentions made in his previously filed briefs.[1] Even a cursory reading of the opinion demonstrates, however, that it supports the government's arguments in this case.

In *Krown*, the defendants gave three certified checks drawn on a nonexistent bank to a Mrs. Amelar in payment for several shipments of meat. The checks were not, of course, collected, and no one involved in the fraud obtained

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[1]For the convenience of the Court, we have lodged copies of the *Krown* opinion with the Clerk of the Court. Pursuant to Rule 35.5 of the Rules of this Court, we file this supplemental memorandum addressing the Second Circuit's recent decision.

an extension of credit as a result of the checks. "Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks." Slip op. 4. The defendants were indicted and convicted under various federal fraud statutes, as well as 18 U.S.C. 1014. The fraud convictions were affirmed on appeal, but the convictions based on Section 1014 were reversed.

The Second Circuit observed that a conviction under Section 1014 rests upon "a false statement or overvaluation of security [that has] the purpose of influencing a bank upon an advance, loan, application or commitment." Slip op. 5. The court concluded that "[i]t would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could, under certain circumstances, constitute overvalued security for an advance, loan or commitment." But, while the checks qualified as "false statements" and "overvalued securities," the convictions under Section 1014 were reversed because "there is no basis in the evidence for a finding that [defendants] had the purpose of influencing the bank to use the * * * checks in connection with an advance, loan, application or commitment." Slip op. 6.

The court noted the split of authority as to whether Section 1014 applies to check kiting schemes, but stated that "[i]t is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. * * * In the present case there

was no * * * granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014." Slip op. 7-8.

The *Krown* decision supports the arguments made in our brief on the merits. First, the Second Circuit held that a check may constitute a "false statement" or "overvalued security" within the meaning of Section 1014.[2] Second, the Section 1014 convictions were reversed by the Second Circuit only because the checks were not utilized for the purpose of obtaining a "loan, advance or commitment." In the

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[2]The court did not suggest that there is any difference between a certified check and an ordinary check for purposes of determining whether a check contains a "false statement" under Section 1014. Petitioner's argument (Pet. Supp. Br. 3) that a certified check can qualify as a "false statement" while an ordinary check cannot will not withstand analysis. Both types of checks are accepted with the expectation that they will be paid in the ordinary course of collection. Indeed, the fact that a drawer's contractual obligations on a check only arise *after* the check has been first presented to a bank and dishonored underscores the fact that a check is more than a mere promise to pay—it is also a representation that funds are on deposit at a bank to cover the document. See La. Rev. Stat. Ann. § 10:3-413(2) (West Cum. Supp. 1951-1981). As one of the law review articles frequently cited by petitioner states: "the making, drawing, uttering, or delivering a check upon a bank with knowledge that there are insufficient funds or credit for payment in full upon presentation, constitutes the false representation of a present or past fact." Comment, *Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals*, 38 Mo. L. Rev. 432, 433 (1973).

present case, however, this critical element is clearly present. Petitioner kited the checks described in Counts II and III of his indictment for the sole purpose of obtaining an immediate extension of credit. The jury was charged that it could not convict petitioner unless the government proved this element beyond a reasonable doubt (J.A. 36, 37) and the record clearly supports the jury's determination of this factual question (see Gov't Br. 4-6).

CONCLUSION

For the reasons stated in this memorandum and our brief on the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I

INTRODUCTION

The government focuses throughout its brief almost exclusively on the question whether "check kiting" falls within the scope of 18 U.S.C. §1014. In so doing, the government's brief goes far beyond the specific allegations of Counts II and III of the indictment at issue, goes far beyond the record of this case and glosses over the clear language of §1014 in a veiled effort to limit its analysis to generalizations about §1014 and about "check kiting" as those words are defined by the government. While this case in part presents petitioner's contention that §1014 cannot be utilized to prosecute "check kiting", the words "check kiting" are used simply because the courts below and the government have attempted throughout this case to *label* the actions of petitioner as "check kiting". (J.A. 21, 27, 36); *United States v. Williams*, 639 F.2d 1311, 1319 (5th Cir. 1981). (A. 20). The issues presented by this case, however, require this Court to look closely at the specific allegations of Counts II and III and the evidence as presented by the record.

The overall question is whether the allegations of Counts II and III are subject to prosecution under §1014 *regardless of how they are labeled.* Labels do not change what is alleged by Counts II and III. The government by labeling petitioner's actions as "check kiting" has made assumptions unsupported by the record and has improperly discussed this case as if the allegations were broader in scope than those actually made.[1]

1. Insofar as the government's labels indicate something more than was what was alleged by Counts II and III, petitioner was not given sufficient notice of the charges which is fatal to this prosecution. See pp. 8-14, *infra.* (See government's argument at p. 40 of its brief)

Count II as returned by the federal grand jury deals with only one check. (J.A. 3). Count III as returned by the federal grand jury deals with only one check. (J.A. 3-4). Nevertheless, without reference to the record or the indictment, the government speaks in terms of "a series" of checks (Gov. Br. 10, 12, 21), a "systematic writing and depositing of checks" (Gov. Br. 18) and a "check kiting scheme". (Gov Br. 10, 12-13, 14-15, 19, 21, 27, 32, 40). The indictment says nothing of any of these.

Moreover, Counts II and III of the indictment do not allege, as the government would have this Court believe (Gov. Br. 18-21), that petitioner made a "false statement". (J.A. 3-4). Counts II and III allege *only* that petitioner "overvalued a security, that is a check. . . ." *Id.* The alleged "overvalu[ation] of a security, that is a check . . ." is purported *only* to have resulted from an alleged representation to the bank at which each respective check was deposited "that said check was of a value equal to the face amount of the check, when in truth and fact, as the defendant then well knew, there were no sufficient funds" in the defendant's account at the drawee bank. (J.A. 3-4). Counts II and III of the indictment allege no more, no less.[2]

The government agrees that petitioner made no oral or written statements or representations at the time the only two checks at issue were deposited, and argues that the checks themselves constitute "false statements" within the meaning of §1014. (Gov. Br. 18, n.8).

There is no evidence in the record of what the bank officers at the depository banks expect when they receive a check for collection or what their "common understanding" is when checks are presented for deposit. (Tr. 4-37, 51-71,

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2. In the government's Statement, it discusses a transaction with the Sabine State Bank. (Gov. Br. 6). Nothing was alleged in the indictment with respect to the Sabine State Bank or any checks drawn upon that bank. (J.A. 3-4).

74-82). The government improperly attempts to fill in these evidentiary deficiencies by its unrestrained use of *ipse dixits* regarding what the government attorneys perceive are the realities of the banking world. (See, e.g., Gov. Br. 12-15, 19, n.9, 20, 21, 23). For example, without any citation to the record, the government concludes that "a banker who realized that the drawer had no funds on deposit would not credit the check to the drawer's account or reduce it to cash." (Gov. Br. 19).[3] This is not only wholly unsupported in the record, it is a misstatement of banking practices. A banker can legally credit an uncollected check to a drawer's account or reduce it to cash, and we submit this is a common banking practice. The government, without support from the record, also improperly states that petitioner's argument "is contrary to the common understanding of the hundreds of thousands of persons who each day accept checks" . . . and, again without citation to the record, attempts to assert what a check is "[i]n common usage."[4] (Gov. Br. 20). Incredibly, the government also has attempted to present what purports to be statistical evidence of what some unknown person has decided are "check kiting" schemes in this country by making rank hearsay statements about the Federal Deposit Insurance Corporation which are not of record and which are highly improper. (Gov. Br. 13-14, n.7). These assertions should be stricken from the government's brief.

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3. This, of course, totally disregards the fact that a bank has an absolute right to pay an uncollected check and also to allow overdrafting. La. Rev. Stat. Ann. §10:4-401(1) (1975) provides in relevant part:

> "As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft."

See also *United States v. Christo*, 614 F.2d 486, 493 (5th Cir. 1980).

4. The government fails to discuss the "common usage" of a certified check, or the "common understanding" of the difference between it and an ordinary check.

The government strongly relies upon its assumption that "check kiting," as defined by the government, was alleged, proven and found by the jury in this case. Contrary to the government's argument that "check kiting" was sufficiently alleged (Gov. Br. 40), Counts II and III each charge only the deposit of one check. (J.A. 3-4). Thus, the appropriate inquiry by this Court is whether a single bad check deposited for collection can, by itself, support a prosecution under §1014.

II

Counts II and III Each Allege Only That Petitioner Deposited a Single Check for Collection Which Does Not Rise to the Level of a Loan or Credit Transaction and Does Not Constitute a Willful Overvaluation of a Security

The charges against petitioner are limited by the indictment. Counts II and III of the indictment allege no more than the deposit of a check for collection. Since the government's position is limited by the indictment and the proof, it cannot properly make quantum leaps from its label of "check kiting" to assumptions as to what was charged by the grand jury and what was proven at trial. Contrary to the government's argument (Gov. Br. 40-41), the deposit of a check for collection, as alleged by Counts II and III, simply does not reasonably describe "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks."

A. The Deposit of a Check for Collection Does Not Rise to the Level of a Loan or Credit Transaction.

As argued in petitioner's initial brief, and as the government apparently does not seriously dispute (Gov. Br. 28-34), 18 U.S.C. §1014 focuses upon loan and credit trans-

actions. (Pet. Br. 14-24). To reemphasize (as the government concedes [Gov. Br. p. 18, n.8]), the petitioner made no oral or written representations when the two checks at issue were presented for deposit. (J.A. 7-10, 12-17, 28, Tr. 36). The government thus takes the position that the mere presentation of the check for deposit can constitute a violation of §1014. (Gov. Br. 18, n.8) The government also concedes that "if a worthless check is submitted to the bank for reasons other than to obtain an extension of credit, the conduct is simply not check kiting in the ordinary sense of the term, and would not fall within the prohibition of §1014." (Gov. Br. 28). Therefore, if the mere deposit of a check does not, as petitioner contends, rise to the level of a loan or credit transaction, this case should be reversed.

There is no factual support for the conclusion by the government that the checks at issue were deposited for the purpose of obtaining an immediate extension of credit. When a check is deposited for collection it cannot be inferred from that act alone that the person making the deposit is requesting an extension of credit. La. Rev. Stat. Ann. §10:3-413(2) (1975). A bank which unilaterally decides to extend credit on a check deposited for collection does not by that act elevate the mere deposit of a check to the status of a request by the depositor for credit. Therefore, the cases relied upon by the government to argue that an extension of funds on an uncollected check is a loan or advance are inapposite. (Gov. Br. 27).

The government also cites *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), in support of its argument that the check deposits in this case were for purposes of influencing the action of a bank upon an advance, commitment or loan. (Gov. Br. 27). However, the facts of that case clearly point out the distinction between a mere deposit of a check for collection and a purported deposit of a

check whereby the depositor actually requests immediate credit. In *Stoddart,* the defendant telephoned a bank official at a bank where the defendant had an account and falsely represented orally that a $1,500 deposit had been made in another branch of the bank and had not been credited to his account. *Id.* at 1052. The defendant further represented that he had written a check in reliance upon that deposit which had been dishonored by the bank because of insufficient funds. The defendant in *Stoddart* was attempting to convince the bank to give him credit on a check, a check which had not been deposited. *Id.*

In the case at issue, the only allegations and evidence presented by the government are the deposit of two checks in two separate and separately charged transactions, with no further representations, written or oral, by the defendant and no request for credit. We submit that the mere deposit of a check is not a credit or loan transaction under §1014. *United States v. Pavlick,* 507 F. Supp. 359, 362-364 (M.D. Penn. 1980).

B. An Uncollected Check upon Which a Bank Extends Credit Becomes an Enforceable Obligation Which Cannot Be Viewed as "Overvalued", nor As a "False Statement".

As discussed above, Counts II and III allege a violation of §1014 *only* in that petitioner "overvalued a security, that is a check." The government fails to address directly the question whether a check deposited for collection can be "overvalued", but rather relies primarily on its own unsupported conclusion that a check deposited for collection is "worthless or nearly worthless". (Gov. Br. 21). The government's only apparent argument with respect to willful overvaluation of a check is that it is the same as "worthless securities that are presented as collateral for a loan." (Gov. Br. 22), citing *United States v. Calandrella,* 605 F.2d 236 (6th Cir.), *cert. denied,* 444 U.S. 991 (1979).

Calandrella involved the use certificates of deposit which at no time were backed by sufficient funds to cover the face value of the certificate of deposit. *Id.* at 240. There is a significant difference between what a certificate of deposit represents and what an ordinary check represents.

Under the Uniform Commercial Code a "certificate of deposit" . . . "is an acknowledgement by a bank of receipt of money with an engagement to repay it. . . ." U.C.C. §3-104; La. Rev. Stat. Ann. §10:3-104(2)(c) (1975). In contrast, the representations embodied by a check are no more than a promise by the drawer to pay the sum stated on the check upon notice of dishonor. La. Rev. Stat. Ann. §10:3-413(2) (1975). The collecting bank in the case of the check has no cause of action against the drawee bank on the instrument and has no right to money contained in said bank even if sufficient funds are present in the drawer's account. J. White & R. Summers, *Uniform Commercial Code*, §13-8 at 500 (2d ed. 1980). This is made abundantly clear by the fact that a check does not operate as an assignment of funds. La. Rev. Stat. Ann. §10:3-409(1) (1975). The relationship between the collecting bank and the drawee bank is not affected by a decision to credit a check prior to collection.

A comparison between a check and a certified check also points out the clear difference in the representations embodied by these two instruments. In the case of a certified check, the bank has certified that an amount is actually being held in the drawee bank and the drawee bank is liable to the holder of a check since certification constitutes a special type of acceptance. La. Rev. Stat. Ann. §10:3-411 (1975). In fact, if a check is certified, the drawer is discharged. La. Rev. Stat. Ann. §10:3-411(1) (1975).

The promise embodied by the check is that the drawer will pay the amount on the face of the check upon notice of dishonor. Such a promise can not be fraudulent unless

made with an intent not to honor the promise. (Pet. Br. 39). Petitioner in this case honored the checks, as promised. (J.A. 16-17, 21, 31-35; Tr. 35-36). The government simply has not made a credible argument to support its conclusion that there has been a willful overvaluation of a check. *See United States v. Edwards,* 455 F. Supp. 1354 (M.D. Penn. 1978). Moreover, assuming *arguendo* that the government was not required to allege a "false statement" (notwithstanding the disjunctive language of the statute), the argument that the deposit of a check is not a "false statement" rests upon the same rationale as petitioner's contention that there has been no willful overvaluation of a check. *United States v. Pavlick,* 507 F. Supp. 359, 361 (M.D. Penn. 1980). See pp. 8-14, *infra.*

Since there were no written or oral statements or representations made by petitioner at the time of deposit (J.A. 7-10, 12-17, 28; Tr. 35-36), the only representations which were made are embodied by the contract. La. Rev. Stat. Ann. §10:3-413(2) (1975).

The government apparently argues that notwithstanding the above, its unsupported perception of "common understandings" somehow modifies the contract embodied by an ordinary check (Gov. Br. 19-20, n.9) and that it is not obliged to prove or even allege this so-called common understanding. The government's suggestion that representations made to the bank exceed the representations defined by statute, without proof beyond the mere deposit of the check for collection, is simply devoid of factual support. La. Rev. Stat. Ann. §10:3-413(2) (1975).

C. Counts II and III in This Case Do Not Allege That Petitioner Engaged in "Check Kiting" nor Do They Allege a "False Statement".

Assuming *arguendo* that §1014 covers the offense of "check kiting" as it is defined by the government, it is

clear, contrary to the government's argument (Gov. Br. 40-41), that Counts II and III have not charged such a violation. (J.A. 3-4).[5]

The sufficiency of an indictment must be measured by two criteria. The first is whether the indictment contains all of the elements of the offense "charged" and sufficiently apprises the defendant of the charges he is required to defend. The second is whether or not the indictment as drawn is sufficient to permit the defendant to plea his acquittal or conviction in bar to another prosecution for similar conduct. *Russell v. United States*, 369 U.S. 749, 761, 763-764 (1962). If the allegations are not sufficiently asserted in the indictment itself, they cannot be added during the trial by the court or the prosecutor because the Fifth Amendment requires that federal felony indictments be those of a grand jury itself. *Id.; Ex Parte Bain*, 121 U.S. 1 (1887).

In contending that the charges are sufficient, the government argues that the indictment "clearly outlines the underlying facts that constitute check kiting." (Gov. Br. 40). The allegations of the indictment and the government's own stated definition of "check kiting" however belie these assertions. (J.A. 3-4).

The government defines "check kiting" as "a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two banks." (Gov. Br. 40-41). It also asserts that "a check kiting scheme involves the systematic writing and depositing of checks for which there are insufficient funds. . ." (Gov. Br. 18). The Fifth Circuit Court of Appeals in *United States v.*

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5. The government suggests that petitioner asserted that the indictment was sufficient under §1014. (Gov. Br. 40). This statement is simply untrue. Petitioner has clearly argued his right to challenge the sufficiency of the indictment. (Pet. Br. 13, n.5).

Payne, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), defined "check kiting" as "involv[ing] a series of facts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the bank involved into a feeling of confidence and security. . . . In short, check kiting . . . was a device for fraudulently obtaining credit sufficiently in the nature of an advance or a loan. . . ." The indictment (Counts II & III) neither alleges nor even remotely describes "check kiting". Counts II & III do not use the words "check kiting", do not allege a scheme and do not allege fraud. (J.A. 3-4). They do not allege the "systematic writing and depositing of checks" nor do they allege the use of a "series" of checks. Rather, as discussed in detail in the introduction, Counts II & III each deal with only one check. (J.A. 3-4).

There is a significant difference between "check kiting" and the mere deposit of one check. The government argues that the jury could find a violation of §1014 only if it concluded that petitioner had undertaken a "series of false representations designed to give [himself] time and credit." (Gov. Br. 28, n.18). The obvious significance of proof of a "series" of transactions as a prerequisite to a finding of guilt (assuming *arguendo* falsity) under §1014 demonstrates that Counts II & III failed to allege the essential elements and facts for a violation grounded upon "check kiting".

Therefore, since "check kiting", according to the government and *Payne*, requires the deposit of multiple checks and a "series of false representations," tracking the language of §1014 alone is insufficient.

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly *without any uncertainty* or *ambiguity*, set

forth all the elements necessary to constitute the offense intended to be punished. . ." *United States v. Carll*, 105 U.S. 611 (1882) (emphasis added). *See also Russell v. United States*, 369 U.S. 749 (1962); *United States v. Hess*, 124 U.S. 483, 486-487 (1888).

Section 1014 nowhere specifies that "check kiting" is an offense thereunder. *United States v. Foshee*, 578 F.2d 629, 631, n.3 (5th Cir. 1978). Thus, the language of the statute alone is insufficiently precise for an indictment, and "check kiting" may not Constitutionally be proved as an offense pursuant to an indictment cast in such language of Counts II and III. (J.A. 3-4).

The government may not seek to correct this insufficiency by looking to the other counts. The government must allege all essential elements of an offense in each separate count, since each count stands alone. *Dunn v. United States*, 284 U.S. 390, 393 (1932). It may not look to other counts in an indictment to give life to an otherwise insufficient allegation of a separate substantive offense unless those counts are expressly incorporated in the count in question. *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975). *See also United States v. Gordon*, 253 F.2d 177 (7th Cir. 1958); *United States v. Fulcher*, 626 F.2d 985 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *United States v. Roberts*, 465 F.2d 1373 (6th Cir. 1972). Therefore, the government may not look to the fact that a single check has been alleged in Counts II and III, neither of which incorporates the other, and contend that it has properly alleged the series of transactions necessary to constitute "check kiting."

The insufficiency of an indictment also may not be corrected by the action of the prosecution or the court. *See Ex Parte Bain, supra.* Thus, the fact that the government and the lower courts in this case went beyond the

facts alleged by the grand jury and informed the jury that the government had actually charged the petitioner with "check kiting," does not permit "check kiting" to be punished under the indictment. (J.A. 36-37). The court charged the jury on "check kiting" (J.A. 35-38), when only two separate incidents of willful overvaluation of "a security" had been alleged. (J.A. 3-4). In so doing, the trial court amended the indictment as found by the federal grand jury. "An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them." *Gaither v. United States,* 413 F.2d 1061, 1071 (D.C. Cir. 1969).

This Court in *Ex Parte Bain, supra,* struck down a conviction found on an indictment which had been amended by the trial court to delete one of the persons allegedly deceived by the defendant. Noting the constitutional requirement that the indictment be that which was found by the grand jury, this Court concluded that an amendment of such an indictment deprives the Court of jurisdiction. *Id.* at p. 13. Therefore, the amendment in this case deprived the trial court of jurisdiction of the offenses alleged in Counts II and III and rendered any conviction found thereon void. *Id.* at p. 13.

A fatal amendment is also effected by verbal instructions given to the jury which add allegations to the indictment. *Stirone v. United States,* 361 U.S. 212, 218-219 (1960). Here, as in *Stirone,* the trial court took away petitioner's substantial right by charging the jury on false statements and "check kiting", neither of which was alleged by the indictment.[6] As in *Stirone,* the addition of these

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6. There are two separate and distinct offenses contemplated by 18 U.S.C. §1014: false statements and willful overvaluation of security. (Gov. Br. 21). Cf. *United States v. Pavlick,* 507 F.

(Continued on following page)

offenses to the plain words of the indictment deprived petitioner of his right to be tried on an indictment found by the grand jury. The Constitutional rights of the petitioner must not be . . . "at the mercy or control of the court or prosecuting attorney" . . . otherwise . . . "the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." *Russell v. United States, supra* at 771. *See also Stirone v. United States,* 361 U.S. 212, 218 (1960); *Ex Parte Bain, supra* at 10, 13.

Finally, the court's amendment of the indictment has had an extremely prejudicial effect upon petitioner that goes well beyond a technical violation of his rights.[7] First, petitioner was not apprised by the indictment that the government would attempt to prove false statements or "check kiting". The extent of harm which this caused to petitioner's preparation of his defense can never be measured. The proof offered at trial is irrelevant since the issue here is "a failure to allege, not a failure to prove." *United States v. Gordon,* 253 F.2d 177, 180 (7th Cir. 1958). Second, since petitioner has been convicted only of the

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Footnote continued—

Supp. 359, 361 (M.D. Penn. 1980). Despite the government's attempt to characterize it otherwise throughout its brief (Gov. Br. 18-21), the indictment on its face alleges only a "willful overvaluation of a security". (J.A. 3-4). The trial court, however, failed to restrict itself to the allegation of "willful overvaluation of a security". (J.A. 37-38). In addition to instructing the jury on "check kiting", the Court said that one of the essential elements of each of Counts II and III was that petitioner "did knowingly and willfully make false statements of a material fact. . ." (J.A. 37). However, the grand jury did not return an indictment based on this separate part of §1014. Therefore, the court's instruction constitutes an additional fatal amendment of the indictment.

7. The government argues that Count I should not also be reversed if this Court reverses as to Counts II & III. (Gov. Br. 35, n.25). However, the improper injection of "check kiting" at this trial when the grand jury did not indict on "check kiting" mandates a reversal of the conviction as to all three counts.

crimes alleged in Counts II and III, which do not facially describe false statements or "check kiting", he may be charged at a later time with "check kiting" under another statute. *See* e.g. 18 U.S.C. §1341. *See also, United States v. Pavlick, supra* at 365. If petitioner is so prosecuted, he may be unable to plead his convictions on Counts II and III as a bar to such a prosecution despite the fact that the jury was instructed that petitioner was charged with "check kiting". (J.A. 36). Therefore, the possibility that petitioner may be tried twice for the same offense is very great indeed.

III

The Rule of Lenity Should Be Applied to §1014

The government's contention that the "rule of lenity" should not be applied to the interpretation of §1014 and its suggestion that petitioner has begun his analysis with that rule are both patently incorrect. (Gov. Br. 36-38). Petitioner began his analysis with the plain words of the statute itself (Pet. Br. 14), and it is undeniable that the statute itself does not mention checks or "check kiting". The statutory history fails to reveal any intention on the part of Congress to regulate the presentation of checks drawn on insufficient funds. Such an intention would have constituted a substantial alteration of traditional state-federal relationships. (Pet. Br. 24-29).[8] Thus, since neither the statute nor the legislative history show any intention to include the offenses with which petitioner was tried, we invoked the "rule of lenity" as one important factor in the analysis. (Pet. Br. 24-29).

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8. The legislative history of the statutes (18 U.S.C. §1961, et seq.; 18 U.S.C. §1951) discussed in the cases of *United States v. Turkette*, 69 L.Ed.2d 246 (1981); and *United States v. Culbert*, 435 U.S. 371 (1978), both relied upon by the government, differ significantly from the history of §1014 since with respect to those statutes Congress made clear its intent that areas previously left to the states would be covered. *Id.*

This is not the first time that the government has come before this Court claiming that an ambiguous statute clearly comprehended conduct which the government wished to punish. *United States v. Enmons*, 410 U.S. 396 (1973), is strikingly similar to this case. There the government argued that the definition of "extortion" under the Hobbs Act included the use of force by union members to obtain legitimate wage demands. This Court rejected the claim that the statutory language was clear. "But the language of the statute is hardly as clear as the government would make it out to be." *Id.* at 399. After reviewing the legislative history of the Act and noting that the government waited some 26 years to bring the first indictment under its proposed theory, the Court rejected the government's contentions. Similarly, in the present case it was not until 1978, some thirty years after the initial passage of §1014, that the first appellate case appears dealing with a prosecution for bad checks under §1014. Indeed, no case involving bad checks appears for eight years after the current version of §1014 was passed by Congress. (Pet. Br. 23, n.9).

The correct statement of the law, and the principle which should be followed in this case, was made clear in *United States v. Bass*, 404 U.S. 336 (1971). In *Bass* this Court stated:

> "While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking." *Id.* at 344.

Because the statute in that case was unclear, as was the legislative history, the Court applied the rule of lenity and adopted the narrower reading of the statute involved. *Id.* at 347.

Congress failed to include bad checks in the language of §1014 and there is no evidence that suggests that it contemplated bad checks as loan or credit transactions. (Pet. Br. 13-37). "When Congress has the will it has no difficulty in expressing it . . . ." *Bell v. United States*, 349 U.S. 81, 83 (1955). Therefore, "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.* This is especially true when the government's assertion of "falsity" or "willful overvaluation" rests upon unproven "common understandings" which are in complete derogation of statutes which expressly define the contractual representations embodied by a check. La. Rev. Stat. Ann. §10:3-413(2) (1975).

The government's assertion that §1014 unambiguously covers "check kiting" and "bad checks" is simply incorrect. *United States v. Edwards, supra; United States v. Pavlick, supra; United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, 657 F.2d 28 (3rd Cir. 1981), petition for cert. pending, No. 81-1047. (Pet. Br. 24-29). Thus, as in *Rewis v. United States*, 401 U.S. 808 (1971), where neither the statutory language nor legislative history supported the government's wide-ranging interpretation of another statute, neither the language nor history of §1014 supports the government's position here. *Id.* Since that is the case, the Court must strictly construe the statute and resolve this dispute in favor of lenity and in favor of petitioner.

IV

"Security" as Used in §1014 May Not Be Defined by Reference to Other Code Sections

The government's attempt to apply the definition of "security" found in other separate, distinct sections of Title 18 of the United States Code to §1014 (Gov. Br. 24) is

inappropriate. It violates the oft-repeated principle that criminal statutes are to be strictly construed. E.g., *United States v. Enmons*, 410 U.S. 396, 411 (1973). Moreover, it directly contradicts numerous decisions of this Court which have refused to apply the definitions or requirements of one code section to another. For example, in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (cited by the government in its Brief, p. 15), this Court refused to expand the jurisdiction of the United States courts to a case of manslaughter committed in a place where murder would have been punishable. While admitting that it was extremely improbable "that Congress could have intended to make those differences with respect to place, which their words import", the Court stated that probability was not a guide and that since Congress had not made manslaughter punishable in that place, "this court cannot enlarge the statute." Similarly, in *Erlenbaugh v. United States*, 409 U.S. 239 (1972), the court refused to read an exception into one code section which was provided in another. See also, *United States v. Bass*, 404 U.S. 336, 344 (1971) . . . "no conclusion can be drawn from [one code section] concerning the correct interpretation of [another section]").

Simply because "security" is defined as comprehending checks in one code section does not mean that "security" as used in §1014 comprehends them. Rather, the plain words of §1014 itself, the context in which they are used and the legislative history of the section are the sole criteria used in interpreting the meaning of "security" as used therein. As petitioner has demonstrated (Pet. Br. 29-32), "security" is used in §1014 in the sense of collateral. The checks alleged in Counts II and III to have been overvalued plainly were *not* collateral, nor did Congress ever contemplate that the mere deposit of a check would be a giving of collateral. Therefore, the

government's attempt to apply the definition of "security" in other code sections to §1014 should be rejected.

V

Failure to Require the Jury to Find Intent to Defraud Will Allow Prosecution under §1014 Without Proof of an Essential Element of the Underlying Offense of "Check Kiting"

The government asserts that petitioner's argument against allowing federal prosecution of bad checks and "check kiting" without proof of intent to defraud "seriously misconstrues the question before the court." (Gov. Br. 41). The government misses entirely the significance of this point.

First, "check kiting", under the government's definition, is "a scheme for obtaining credit by depositing a series of worthless checks in accounts maintained at different banks." (Gov. Br. 12). See also *United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980).

"Check kiting" has been defined by the government, the Fifth Circuit in *Payne*, by the prosecutions for check kiting under 18 U.S.C. §1341, and also by the majority of the state bad check laws *to include the essential element of intent to defraud.* Comment, "Insufficient Funds Checks in the Criminal Area: Elements, Issues and Proposals," 38 Mo. L. Rev. 432 (1973) (see statutes cited therein); Comment on Legislation, "Bad Check Laws," 44 Harv. L. Rev. 451 (1931) (see statutes cited therein); *Ciullo v. United States*, 325 F.2d 227 (D.C. Cir. 1963); Ch. 273, 42 Stat. 820 (1922); D.C. Code Ann. §22-1410 (1973). However, "no federal statute explicitly makes the kiting of checks a crime. . . ." *United States v. Foshee*, 578 F.2d 629, 631, n.3 (5th Cir. 1978). For this Court to conclude that

"check kiting" comes within the reach of §1014 without requiring proof of the essential elements which comprise the offense of "check kiting" or "bad checks" will enable the government, in effect, to obtain a conviction for actions dependent upon an intent to defraud without proving intent to defraud.[9]

Second, this argument also relates to petitioner's contention that Congress in passing §1014 did not intend to expand the jurisdiction of the federal government to "bad checks" or "check kiting". (Pet. Br. 35-37). The government argues incorrectly that petitioner "conceded" that prosecutions under state bad check laws do not rest upon the defendant's breach of a contractual "promise that the check will be paid upon due presentment, but upon the fact that in presenting a bad check the defendant has been guilty of such fraud and misrepresentation as to be punishable as a crime." (Gov. Br. 20). Contrary to this misstatement, petitioner clearly argued that in *Payne* the Fifth Circuit failed to disclose that in *Law of Modern Commercial Practice,* Whitney reached *his* conclusion of what representations were made when a check is deposited by relying upon *state* bad check laws. (Pet. Br. 28). Moreover, without authority or citation, Whitney also concluded incorrectly that in giving a check the drawer "promise[d] to the holder that the check would be paid upon due presentment. . ." Whitney, *Law of Modern Commercial Practice,* §341 (1965). *That simply is not the promise embodied by a check.* La. Rev. Stat. Ann. §10:3-413 (2) (1975). Moreover, the majority of state statutes require proof of intent to defraud under the bad check laws, a significant element which the government glibly argues

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9. The government contends that under §1014 "whether the defendant carries the misrepresentation to the point of actually defrauding the institution is completely irrelevant." (Gov. Br. 42).

is not necessary for prosecution of "check kiting" under §1014. (Gov. Br. 42).

To fail to require the jury to find intent to defraud will allow the jury in a prosecution under §1014 to find a violation without proof of an essential element of the underlying offense of "check kiting". This Court should find that §1014 does not extend to a charge of "check kiting."

VI

CONCLUSION

For the reasons stated above, petitioner prays that this Court reverse his convictions on Counts II and III and that said counts be dismissed with prejudice. Petitioner further prays, in light of the substantial prejudice from the "check kiting" instructions, that the conviction on Count I be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, NICKOLAS P. CHILIVIS, do hereby certify that I have this day served the within and foregoing Reply Brief for petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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This 6th day of April, 1982.